

**CLOSING GUANTANAMO: THE
NATIONAL SECURITY, FISCAL,
AND HUMAN RIGHTS IMPLICATIONS**

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND HUMAN RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

JULY 24, 2013

Serial No. J-113-22

Printed for the use of the Committee on the Judiciary



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WEDNESDAY, JULY 24, 2013

UNITED STATES SENATE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS
AND HUMAN RIGHTS
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:02 p.m., in Room SH-216, Hart Senate Office Building, Hon. Dick Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin, Leahy, Feinstein, Whitehouse, Klobuchar, Hirono, and Cruz.

**OPENING STATEMENT OF HON. DICK DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chairman DURBIN. Good afternoon. This hearing of the Subcommittee on the Constitution, Civil Rights and Human Rights will come to order. I understand Senator Cruz, my Ranking Member, is going to be here very briefly.

Today's hearing is entitled, "Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications." We are pleased to have a large audience. That demonstrates the importance and timeliness of this discussion.

Thanks to those of you who are here in person and those following the hearing on Twitter and Facebook using the hashtag #closegitmo.

At the outset, I want to note that the rules of the Senate prohibit outbursts, clapping, or demonstrations of any kind. There was so much interest in today's hearing that we moved to a larger room to accommodate everyone. Anyone who could not get a seat is welcome to go to the overflow room for a live video feed, 226 of Dirksen, the same floor.

I will begin by providing some opening remarks. Then I will turn to Senator Ted Cruz and Senator Leahy, our Chairman of the Full Committee, who has now joined us, for opening statements before we turn to witnesses.

Well, it has been more than 11 years since the Bush administration established the detention center at Guantanamo Bay. In that time I have spoken on the Senate floor more than 65 times about the need to close this prison. I never imagined that in 2013 not

only would Guantanamo still be open, but some would be arguing that we keep it open indefinitely.

The reality is that every day it remains open, Guantanamo prison weakens our alliances, inspires our enemies, and calls into question our commitment to human rights. Time and again, our most senior national security and military leaders have called for the closure of Guantanamo.

Listen to retired Air Force Major Matthew Alexander. He led the interrogation team that tracked down al-Zarqawi, the leader of Al-Qaeda in Iraq. Here is what the major said: "I listened time and again to foreign fighters and Sunni Iraqis state that the number one reason they decided to pick up arms and join Al-Qaeda were the abuses at Abu Ghraib and the authorized torture and abuse at Guantanamo Bay."

"It is no exaggeration," the major said, "to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse."

In addition to the national security cost, every day that Guantanamo remains open, we are wasting taxpayer dollars. According to updated information I received from the Department of Defense just yesterday, Guantanamo Bay detention costs for Fiscal Year 2012 are \$448 million and for Fiscal Year 2013 estimated at \$454 million.

Do the math: 166 prisoners, \$454 million. We are spending \$2.7 million per year for each detainee held at Guantanamo Bay. What does it cost to incarcerate a prisoner and keep them in the safest and most secure prison in America in Florence, Colorado: \$78,000 a year against \$2.7 million that we are spending in Guantanamo.

This would be fiscally irresponsible during ordinary economic times, but it is even worse when the Department of Defense is struggling to deal with the impact of sequestration, including the furloughs and cutbacks in training for our troops.

Every day the soldiers and sailors serving at Guantanamo are doing a magnificent job under difficult circumstances. I went to the Southern Command in Miami, and I met with the men who were in charge of this responsibility. I can tell you that they are saddened by this assignment, but they are doing exactly what they are supposed to do. At great risk and at great separation from their family and personal challenge, they are accepting this assignment. And they look to us as to whether this assignment still makes sense.

Every day at Guantanamo Bay, dozens of detainees are being force-fed, a practice the American Medical Association and the International Red Cross condemn and that a Federal judge in Washington recently found to be "painful, humiliating, and degrading."

As President Obama asked in his May 23rd national security speech, "Is this who we are? Is that something our Founding Fathers foresaw? Is that the America we want to leave our children? Our sense of justice is stronger than that," the President said.

It is worth taking a moment to recall the history of Guantanamo Bay. After 9/11, the Bush administration decided to set aside the Geneva Conventions, which have served us well in past conflicts,

and set up an offshore prison in Guantanamo in order to evade the requirements of those treaties and our Constitution. John Yoo, working in that White House, wrote on December 28, 2001, an Office of Legal Counsel memo to Jim Haynes and said that Guantanamo was “the legal equivalent of outer space,” a perfect place to escape the law. But others, others even within the Bush administration, disagreed.

General Colin Powell, then the Secretary of State, objected. He said disregarding our treaty obligations “will reverse over a century of U.S. policy and practice and undermine the protections of the law of war for our own troops. It will undermine public support among critical allies, making military cooperation more difficult to sustain.”

Then-Defense Secretary Rumsfeld approved the use of abusive interrogation techniques at Guantanamo. These techniques became the bedrock for interrogation policy in Iraq. According to a Defense Department investigation, the horrible images that emerged from Abu Ghraib have seared into our memory some of the most outrageous and extreme techniques. Guantanamo became an international embarrassment and an international controversy.

The Supreme Court repeatedly struck down the administration’s detention policies. Justice Sandra Day O’Connor famously wrote for the majority in the *Hamdi* case, “A state of war is not a blank check for a President.”

By 2006, even President Bush—President Bush—said he wanted to close Guantanamo. In 2008, the presidential candidates of both major parties supported closing Guantanamo. Within 48 hours of his inauguration, President Obama issued an Executive Order prohibiting torture and setting up a review process for all Guantanamo detainees.

I will be first to acknowledge that the administration could be doing more to close Guantanamo. Last week, Senator Feinstein and I met with senior White House officials to discuss what they are doing under existing law to transfer detainees out of Guantanamo. But let us be clear. The President’s authority has been limited by Congress. We have enacted restrictions on detainee transfers, including a ban on transfers to the United States from Guantanamo, that make it very difficult if not impossible to actually close the facility. It is time to lift those restrictions and move forward with shutting down Guantanamo. We can transfer most of the detainees safely to foreign countries, and we can bring the others to the United States where they can be tried in Federal court or held under the law of war until the end of hostilities.

Let us look at the track record. Since 9/11—since 9/11—nearly 500 terrorists have been tried and convicted in our Federal courts and are now being safely held in Federal prisons. No one—no one—has ever escaped from a Federal supermax prison or a military prison.

In contrast, only six individuals have been convicted by military commissions. Two of those convictions have been overturned by the courts.

Today, nearly 12 years after 9/11, the architects of the 9/11 attacks are still awaiting trial in Guantanamo.

During his confirmation hearing, I discussed with Jim Comey, who was Deputy Attorney General in the Bush administration and is the nominee for FBI Director, this whole case. Here is what he told me: "We have about a 20-year track record in handling particularly Al-Qaeda cases in Federal courts ... the Federal courts and Federal prosecutors are effective at accomplishing two goals in every one of these situations," Comey said, "getting information and incapacitating the terrorist."

Some may argue we cannot close Guantanamo because of the risk some detainees may join and engage in terrorist activities. But studies show that even in our Federal prisons, the recidivism rate is more than 40 percent, far higher than the rate of any of those released from Guantanamo. And the often quoted recidivism estimate includes hundreds of detainees transferred under the Bush administration when the standards for release were much more lax.

No one is suggesting that closing Guantanamo is risk free or that no detainees will ever engage in terrorist activities if they are transferred. But if a former detainee does return to terrorism, he will likely meet the fate of Said al-Shihri, the number two official in Al-Qaeda in the Arabian Peninsula, who was recently killed in a drone strike.

The bottom line is our national security and military leaders have concluded that the risk of keeping Guantanamo open far outweighs the risk of closing it because the facility continues to harm our alliances and serve as a recruitment tool for terrorists. It is time to end this sad chapter of our history. Eleven years is far too long. We need to close Guantanamo.

I will now recognize Senator Cruz, the Ranking Member.

**OPENING STATEMENT OF HON. TED CRUZ,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CRUZ. Thank you, Mr. Chairman.

President Obama tells us the war on terror is over, that Al-Qaeda has been decimated, and that we can now take a holiday from the long, difficult task of combating radical Islamic terrorism. I do not believe the facts justify that rosy assessment.

Five years ago, the President campaigned on closing Guantanamo, and yet Guantanamo remains open as a detention facility for those deemed to be the most dangerous terrorists that have been apprehended. And, to date, the administration's position seems to be to continue apologizing for the existence of Guantanamo, to continue apologizing for our detaining terrorists, and standing up to defend ourselves, but to do nothing affirmatively to address the problem.

In particular, if Guantanamo is closed, it raises the fundamental question of where these terrorists will be sent. Now, we can embrace a utopian fiction that they will be sent to their home nations and somehow lay down their arms and embrace a global view of peace. I do not think that utopian fiction has any basis in reality. We have seen, whether it was in Boston or Benghazi or Fort Hood, that radical terrorism remains a real and live threat.

Now, I have significant concerns about the Obama administration's overbroad incursions into the civil rights of law-abiding

Americans. But at the same time, I have concerns about their unwillingness or inability to connect the dots and to prevent violent acts of terrorism. And until we are presented with a good, viable strategy for what to do with terrorists who would work night and day to murder innocent Americans, I have a hard time seeing how it is responsible to shut down our detention facilities and send these individuals home where they almost surely would be released and almost surely would return to threaten and kill more Americans.

That is a question I hope this panel sheds some light on, how we can responsibly proceed in protecting the national security of this country, protecting the men and women of this country who expect, as the first responsibility of the Federal Government, that we will keep the Nation secure. And I look forward to the testimony today on that question.

Chairman DURBIN. Thank you, Senator Cruz.
Senator Leahy.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY,
A U.S. SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Well, thank you, and I do want to thank Senator Durbin for holding this hearing. I think it is long past time that we take action and end this unfortunate chapter in our Nation's history. You can do that and still fight terrorism as it threatens us. It is nice to make up quotes and pretend the President said something about taking a holiday from terrorism, but, of course, he never said any such thing. But I do know that, for over a decade, the indefinite detention of prisoners at Guantanamo has contradicted our most basic principles of justice; it has degraded our international standing; and by itself it has harmed our national security. I think it is shameful that we are still even debating this issue.

As long as we keep this detention center open at Guantanamo, it will continue to serve as a recruiting tool for terrorists, just as the photographs after Abu Ghraib did. It will discredit America's historic role as a leader in human rights. Countries that champion the rule of law and human rights do not lock away prisoners indefinitely without charge or trial. Countries that champion the rule of law and human rights do not strap prisoners down and forcibly feed them against their will. We condemn authoritarian states when they do this—and we should—but we should not tolerate the same thing in our country.

As Senator Durbin points out, at a time of sequestration, to be spending as much as \$2.5 to \$2.7 million per prisoner to hold them in Guantanamo—because if we are going to hold these people, we could do it for far, far less at our supermax prisons, if that is the issue. I mean, how can we talk about all the things we have to take out of our budget because there are things that actually benefit Americans and yet we can spend this kind of a fortune down there and talk about spending hundreds of millions of dollars more to overhaul the compound. That is what has been requested. For more than a decade, we have seen precious manpower, resources, and money squandered on this long-failed experiment instead of being

directed to important national security missions at home and abroad. I think the waste has to end.

Furthermore, again, as Senator Durbin pointed out, the military commission system for trying these detainees is not working. It is a tiny handful that have been prosecuted there as compared to the hundreds in our Federal courts. We have already seen Federal courts overturn two convictions at Guantanamo in opinions that will prevent the military from bringing conspiracy and material support charges against detainees—something that even the lead military prosecutor at Guantanamo himself acknowledged.

These same charges, though, can be pursued in Federal courts where our prosecutors do have a strong track record of obtaining long prison sentences against those who seek to do us harm. We are the most powerful Nation on Earth. Why do we act afraid to use the best Federal court system we have ever seen, probably the best court system in the world, and we act like we are afraid to use it? We have convicted nearly 500 terrorism suspects since 9/11 in these Federal courts.

So the status quo at Guantanamo is untenable, and I appreciate the President's renewed vow to shutter this unnecessary, expensive, and inefficient prison. His decision in June to appoint a new special envoy at the State Department to coordinate efforts to repatriate detainees is a positive step toward closing the facility. So too are reports that the Periodic Review Boards will soon begin reviewing cases.

Now, I am glad to see that commonsense provisions were included in this year's National Defense Authorization Act that was recently reported by the Senate Armed Services Committee. It will be incremental, but it will help, and I look forward to working with Members of Congress to bring this about.

I will put my full statement—I know you have witnesses waiting, Mr. Chairman. I will put my full statement in the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman DURBIN. Mr. Chairman, thank you for being here, and thank you for the support you have given to this Subcommittee.

We want to welcome one of the fellow Members of the Senate Judiciary Committee, not a Member of this Subcommittee, but today she is more than honorary. She is going to be welcome to participate. You even can come down the line if you would like and sit a little closer.

Senator FEINSTEIN. A little later.

Chairman DURBIN. Okay, good. Senator Dianne Feinstein.

**OPENING STATEMENT OF HON. DIANNE FEINSTEIN,
A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you, Senator. Thank you for your comments and thank you for allowing me to sit with your Subcommittee.

As you mentioned, I believe, when I came in the room, I was at Guantanamo about a month ago with John McCain and the President's Chief of Staff. We have been looking at the figures of cost, and apparently they are much higher than we thought. If the new costs are correct, the cost of the facility is \$554.1 million in 2013,

and as Senator Leahy said, that is \$2.67 million per detainee. I want to point out that to keep a prisoner in maximum security in our Federal system is \$78,000. So this is a massive waste of money.

A month ago, when I was there, there were 166 inmates. Most have been there for a decade or more—10 years with no hope, no trial, no charge. These 166 detainees are slated for trial while 46 others will be held without trial until the war against terror is over, whenever that may be. Eighty-six of them, more than half, have been cleared for transfer by either the Bush or the Obama administration. Nonetheless, they remain in dismal conditions and legal limbo.

By the end of President Obama's second term, the majority of Guantanamo detainees there today will have been held without trial for almost 15 years. I would submit that this is not the American way, and I would submit that Guantanamo has been a recruiting tool for terrorists. It makes a myth out of our legal system, and it really ought to be closed.

We saw the hopelessness. We saw when we were there 70 detainees were undergoing a hunger strike. Twice a day, American military personnel restrains the detainee in a chair by his arms, torso, and feet. A tube inserted through the nose and into the stomach, and for some detainees, this has been going on for 5 months twice a day.

I am very pleased that you have some medical testimony here today, and I look forward to hearing it. But this large-scale force feeding and this behavior is a form of protest. It is not an attempt at suicide. I believe it violates international norms and medical ethics. And at Guantanamo it happens day after day and week after week.

So I find this unacceptable. I believe the facility should be closed. I believe all of these people can be transferred to high-security facilities in this country and that that is the proper thing to do.

So I thank you for this opportunity.

Chairman DURBIN. Thank you, Senator Feinstein.

Senator Whitehouse, do you have any opening comments?

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,
A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Very briefly, because I want to get to the witnesses, but I do want to thank you, Chairman Durbin, for holding this hearing. I think it is really important.

I have been around long enough to have been through several stages on Guantanamo. There was the stage where it was the worst of the worst, and they were too dangerous to release. And then the Bush administration released a huge chunk of them and then said, okay, now we are really down to the worst of the worst. And then they released another huge chunk of them. Now we have I think 86 of 166 slated for release, and we simply have not been able to find places for them to go.

So we were kind of fed a bill of goods about who was there along the road and about how dangerous they were, because over and over again they have either been released in these waves or slated for release. And in my time on the Intelligence Committee, both under Chairman Rockefeller and under Chairman Feinstein, we

heard over and over again from our national security officials about the value of Guantanamo as a recruiting tool for our enemies.

So this is a very timely hearing, and I am grateful to the leadership of you, Senator Durbin, of the Chairman of our Judiciary Committee, Patrick Leahy, who is here, and of Chairman Feinstein as the Chairman of the Intelligence Committee.

Thank you.

Chairman DURBIN. Thank you, Senator Whitehouse.

It is the custom of the Committee to swear in the witnesses, and I would ask the first panel to please rise. Raise your right hand. Do you affirm the testimony you are about to give before the Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

General EATON. I do.

General XENAKIS. I do.

Lieutenant FRYDAY. I do.

Mr. GAFFNEY. I do.

Ms. MASSIMINO. I do.

Chairman DURBIN. Thank you. Let the record reflect that all of the witnesses on this panel answered in the affirmative. And before I recognize the first witness, I ask consent to enter into the record a statement from Retired Major General Michael Lehnert, who served in the Marine Corps for 37 years. General Lehnert led the first Joint Task Force Guantanamo, which established the detention facility in 2002. He could not be here today, but we wanted to make sure his views were in the record. We will circulate his statement to the whole Committee, and I commend it to my colleagues. As he details in his statement, General Lehnert tried to comply with the Geneva Conventions and asked to bring in the Red Cross to inspect this facility. He was rebuked by civilian political appointees. Here is what he says:

"We squandered the good will of the world after we were attacked by our actions in Guantanamo. Our decision to keep Guantanamo open has actually helped our enemies," the general writes, "because it validated every negative perception of the United States. To argue we cannot transfer detainees to a secure facility in the United States because it would be a threat to public security is ludicrous."

We are pleased to be joined here today by Retired Major General Paul Eaton. Major General, it is good to see you again. He is currently a senior advisor to the National Security Network. He retired from active duty after more than 30 years in the United States Army. From 2003 to 2004, General Eaton served in Iraq as the commanding general of the Coalition Military Assistance Training Team. Prior to serving in Iraq, General Eaton commanded the Army's Infantry Center and was Chief of Infantry for the Army. He studied at West Point, earned a master's degree in political science from Middlebury College.

General Eaton, thank you for your service. You have 5 minutes, and your entire statement will be made part of the record and then open to questions. Please proceed.

**STATEMENT OF MAJOR GENERAL PAUL D. EATON,
U.S. ARMY, RETIRED, FOX ISLAND, WASHINGTON**

General EATON. Chairman Durbin, thank you very much. Ranking Member Cruz and Members of the Subcommittee, thank you very much for inviting me here to share my views on closing the Guantanamo Bay Detention Center.

You mentioned that I had the last operational mission to create the Iraqi armed forces. My biggest challenge when I did that was to overcome over 30 years of despotism and its impact on the society in Iraq. So we worked very hard to develop what the Brits call "the moral component," to instill the adherence to the rule of law. We drilled daily the notion of civilian control of the military, military justice, prisoner management, and battlefield discipline. We stressed accountability.

Then Abu Ghraib blew up on us. The day that happened, the day it hit the press, my senior Iraqi advisor, an Air Force general under Saddam, retired, came into my office and said, "General, you cannot understand how badly this is going to play on the Arab street." We lost the moral high ground.

The investigation of Abu Ghraib by Major General Tony Taguba, a great American hero, found that torture implemented at Guantanamo was exported to detainee operations in Iraq. Abu Ghraib was a logical outcome of our Guantanamo experience. Men who had served in Guantanamo during the worst days of enhanced interrogation techniques were deployed to Iraq to "Gitmo-ize interrogations." Not my words. Borrowed from testimony. Abu Ghraib was the spawn of Guantanamo, and it is one reason why I am convinced that we have got to close down this detention center.

You cannot buff Guantanamo enough to make it shine again after the sins of the past. Improvements in detainee treatment and new military commission rules will not change the belief in the minds of our allies and our enemies that Guantanamo is a significant problem to the prosecution of the U.S. national security agenda in general and the U.S. military in particular.

The argument that the Guantanamo facility represents a valuable intelligence tool is simply wrong. The shelf life intelligence has and particularly the people who have the potential intelligence is very short. The argument that the Guantanamo facility is necessary to hold dangerous men is simply wrong. As Senator Durbin mentioned, our supermax prisons do this quite well.

We have a great many allies and alliances created for many reasons, most providing for the mutual defense. My team in Iraq was composed of nine nations, military and civilian. In late-night discussions, our Guantanamo problem would come up from time to time, and after Abu Ghraib, often. Some of our closest allies have refused to send up detainees because of Guantanamo, and we are losing intelligence opportunities every time this happens.

Releasing any individual Guantanamo detainee does not change our national security posture. To this soldier, the fear-based argument to keep the Guantanamo Bay detention facility open is hard to understand. If brought to the U.S. for prosecution, incarceration, or medical treatment, the detainees will pose no threat to our national security. The 86 men who have been cleared for transfer

should be transferred. We must find lawful dispositions for all law of war detainees as we have done in every conflict.

Further, Guantanamo places our soldiers and Nation at risk not only because it makes America look hypocritical as we promote the rule of law but because it makes the detainees look like the warriors that they are not. Our leaders in Iraq would pose the question early and often: "Did we create more terrorists today than we managed to take off the street?" Guantanamo is a terrorist-creating institution and is a direct facilitator in filling out the ranks of Al-Qaeda and other terror organizations that would attack our country and our interests. Guantanamo, in military terms, is a combat power generator for the enemy.

We as a Nation are strongest when we uphold the Constitution, the Bill of Rights, the Geneva Conventions, and the other laws and treaties and conventions to which we subscribe. We are weakest when we stray from the rule of law. We have an opportunity and an imperative to close Guantanamo now as we wind down combat operations in Afghanistan.

There is no national security reason to keep Guantanamo open. In the words of one of my colleagues, they do not win unless they change us. And we have got to resist that attempt at change.

Thank you very much, Mr. Chairman.

[The prepared statement of General Eaton appears as a submission for the record.]

Chairman DURBIN. Thank you, General Eaton.

Brigadier General Stephen Xenakis served in the U.S. Army as a medical corps officer for 28 years before retiring. A psychiatrist with an active clinical and consulting practice, General Xenakis is an adjunct professor at the Uniformed Services University of Health Sciences in the Military Medical Department. He is the founder of the Center for Translational Medicine, a research organization developing treatments and conducting tests on brain-related conditions affecting soldiers and veterans. General Xenakis previously served as senior advisor to the Department of Defense on issues relating to the care and support of servicemembers and their families, graduated from Princeton University and the University of Maryland School of Medicine.

General Xenakis, thank you for your service to our country, and please proceed.

**STATEMENT OF BRIGADIER GENERAL STEPHEN N. XENAKIS,
M.D., U.S. ARMY, RETIRED, ARLINGTON, VIRGINIA**

General XENAKIS. Thank you, sir, and thank you, Ranking Member Cruz and Members of the Subcommittee, Senator Feinstein. I appreciate the opportunity to testify today.

As you said, I am board-certified in general psychiatry and child and adolescent psychiatry. I have extensive experience in treatment, research, teaching, and administration, commanded—retired at the rank of Brigadier General, commanded medical activities, medical centers, and medical regions.

The Federal courts and the Office of the Military Commissions have qualified me as a psychiatric and medical expert. I have had multiple interviews—multiple interviews—with detainees, advised attorneys, and spent cumulatively nearly 3 months at Guantanamo

over the past 4½ years. I currently provide consultation and expert testimony as needed on seven current or former detainees. I have reviewed medical, intelligence, and military files of nearly 50.

The treatment of hunger strikers at Guantanamo compromises the core ethical values of our medical profession. The AMA has long endorsed the principle that every competent patient has the right to refuse medical intervention.

The World Medical Association and the International Red Cross have determined that force feeding through the use of restraints is not only an ethical violation but contravenes Common Article 3 of the Geneva Conventions. Force feeding completely undermines the physician-patient relationship by destroying the trust that is essential for all clinical treatment, including medical issues unrelated to force feeding. It engages physicians in the use of force against detainees. At Guantanamo, physicians and nurses have become part of the command apparatus that uses punitive and painful methods to break the hunger strikes, and the use of restraint chairs, dry cells, forced cell extractions, and denial of communal privileges.

The plain truth is that force feeding violates medical ethics and international legal obligations, and nothing claimed in the name of defending our country can justify cruel, inhumane, and degrading treatment of another man or woman. The detention facilities at Guantanamo diminish America's standing among our allies and put at question our true values.

The underlying issues that contributed to the hunger strike must be addressed, including ending the harsh conditions of confinement that have been put into place this year.

Statements in the media leave the impression that the detainees are highly trained soldiers eager to get back on the battlefield. The vast majority of these men do not fit the picture of the worst of the worst. These detainees pale in comparison to violent prisoners accused of serious felonies or murders that I have seen and evaluated in this country.

To be clear, if any detainee has committed a crime, I strongly believe that they should be charged, prosecuted, and convicted, punished accordingly. The fact is, however, that most of these detainees have not been charged. The restrictive and oppressive conditions undermine our national security objectives. Force feeding must end. It is unethical, an affront to human dignity, a form of cruel, inhumane, and degrading treatment in violation of our Geneva Convention obligations.

My recommendations include:

First, the underlying issues that contributed to the hunger strike must be resolved, including expeditious release.

Second, detainees should not be punished for engaging in hunger strikes.

Third, all directives, orders, and protocols that provide, explicitly or implicitly, that health professionals act as adjuncts of security officials must be rescinded. Trust in the medical staff by detainees has been so deeply compromised. Independent doctors and nurses should be brought in.

Fourth, aging detainees require more complicated and sophisticated medical care. The regular rotation of clinical staff impedes continuity of care, diagnosis, and treatment. It places dedicated

and professional military clinicians in untenable circumstances of providing suboptimal treatment to an increasingly ill population. It is not fair to the doctors, nurses, or detainees.

Thank you for the privilege of speaking to you.

[The prepared statement of General Xenakis appears as a submission for the record.]

Chairman DURBIN. Thank you, Dr. Xenakis.

We will now hear from our next witness, Frank Gaffney. Mr. Gaffney is founder and president of the Center for Security Policy, a think tank in Washington. He is a weekly columnist for the Washington Times, Townhall, and Newsmax.com. He is the host of "Secure Freedom Radio," a syndicated radio program. In the 1980s, Mr. Gaffney served in the Reagan Administration as Assistant Secretary of Defense for International Security Policy and Deputy Assistant Secretary for Nuclear Forces and Arms Control Policy. Prior to his work in the Department of Defense, he was a professional staff member on the Senate Armed Services Committee. He received a bachelor's degree from Georgetown University and a master's in international studies from Johns Hopkins School of Advanced International Studies. Mr. Gaffney, the floor is yours.

**STATEMENT OF FRANK J. GAFFNEY, JR., PRESIDENT,
CENTER FOR SECURITY POLICY, WASHINGTON, DC**

Mr. GAFFNEY. Thank you, Mr. Chairman. One small addendum. I also had the privilege of serving in this body for Senator Scoop Jackson, who many of you have a long and wonderful memory of, I am sure.

I appreciate the chance to testify on this issue. I recognize that I am in the distinct minority on this panel, but I take comfort from the fact that I think I represent the vast majority of Americans and certainly the vast majority of those of you in Congress on this question: Should Gitmo be closed? And I think the answer is resoundingly no, unless there is a better alternative available to us.

I would like to describe why I think there is not a better alternative available by putting this into context, if I may, and that is to describe why we have Gitmo in the first place. It is because we are at war. This is a point that is seemingly lost on a lot of us who talk about this in sort of an abstract concept that somehow this detention facility can be removed from that overarching problem.

We are not just at war. We are at war because others attacked us. And in your wisdom, you here in the Congress gave the authority to fight back. I am afraid that increasingly, however, we have lost sight as to who it is we are fighting with. And, again, I think that bears directly on the question before you all today.

We are fighting, I would suggest, against people who adhere to a doctrine they call "Shariah." Not all Muslims do, but those that are engaged at this point in—

[Audience outburst.]

Mr. GAFFNEY. Excuse me.

Chairman DURBIN. Please. No outburst of approbation or disapprobation. Thank you.

Mr. GAFFNEY. Those that do adhere to this doctrine believe that it is their obligation to destroy us, to force us to submit to their will.

That bears directly upon this question of what happens if they are allowed to return to the battlefield, and I think we all agree recidivism among those who are released from Gitmo is a problem. Perhaps, as you said yourself, I think, Mr. Chairman, it is not as bad as recidivism in the Federal prison system. That is a sobering thought, which, again, I would argue suggests we do not want to put these prisoners into the Federal prison system if it is even worse than it is at Gitmo.

The main point, though, is if the commitment these prisoners have, should they be allowed out, is to wage this jihad, as they call it, against us until we submit, it adds urgency to the question that Senator Cruz asked, which is, how do you prevent that from happening? And I would, with the greatest of respect, say I find unconvincing the idea that any of these problems are made more tractable by simply moving these people into the United States.

For one thing, it does raise a question as to whether the costs that we are paying—and several of you have alluded to this excessive, wasteful, inefficient cost. But how much has it meant that not a single one of these people or any of their friends have been able to attack us because of their proximity to a Federal detention facility inside the United States? How many Americans' lives have been spared as a result? There is no way to know for sure. But are you feeling lucky? Do you want to take a chance?

My guess is you will find much more violence inside the Federal prison system, not the least because these individuals will be engaged in proselytizing their form of Islam, Shariah, inside the prison system. But beyond that, you will have almost certainly their colleagues trying to do what was done in Iraq yesterday by Al-Qaeda, which is to try to spring them, or at the least, inflict harm on an American community that has the misfortune—perhaps the Thompson Correctional Facility community as an example, has the misfortune of incarcerating these people.

Let us just set aside the numbers that you might or might not feel you can safely push out. There are a number, an unknown number—but the President has apparently said it is 46—that you can never try. Do you honestly think that the people behind me and the people who are impelling this hearing will stop cavilling for the release of those prisoners just because they are now in the United States?

And, finally, I would just say to you, as you know better than I, Federal judges inside this country will almost certainly look, at least some of them, with sympathy on the claim that these prisoners—once they are inside the United States, once they are entitled to all kinds of constitutional rights they might not otherwise have in places like Gitmo—and that would perhaps result in their release inside the United States.

I find that it would be beyond malfeasance were we to go down that road. It is dereliction of duty. I pray you will not close Gitmo, and I hope that my testimony will encourage you not to do that.

Thank you.

[The prepared statement of Mr. Gaffney appears as a submission for the record.]

Chairman DURBIN. Thank you, Mr. Gaffney.

Our next witness is Lieutenant Josh Fryday. Lieutenant Fryday is a member of the Judge Advocate General Corps in the United States Navy. He is currently stationed in Washington, DC, at the Office of the Chief Defense Counsel for Military Commissions. In addition to his legal duties, Lieutenant Fryday served in the Navy's humanitarian aid and disaster relief effort following the tsunami and nuclear disaster in Japan. Prior to joining the Navy, Lieutenant Fryday worked in the San Francisco District Attorney's Office and the U.S. Attorney's Office for the Northern District of Illinois. He received his B.A. in political science and philosophy from the University of California at Berkeley where he graduated Phi Beta Kappa. He received his J.D. from the University of California Berkeley School of Law.

Lieutenant Fryday, thank you for being here today, and please proceed.

**STATEMENT OF LIEUTENANT JOSH FRYDAY, JUDGE
ADVOCATE GENERAL'S CORPS, U.S. NAVY, WASHINGTON, DC**

Lieutenant FRYDAY. Thank you, Chairman Durbin, Ranking Member Cruz, and Members of the Committee, for inviting me today to testify. I am grateful for the opportunity to share my experiences with you.

While the Office of the Chief Defense Counsel for the Military Commissions is aware that I am testifying today, my statement is based on my own personal experience and knowledge and does not reflect the views of my office, the Navy, or the Department of Defense.

Over the past year, I have been assigned under military orders to serve as military defense counsel for individuals detained in Guantanamo Bay, Cuba. As you know, there are 166 remaining. I represent one of them, and his name is Mohammed Khameen.

People often ask me if it is difficult representing a detainee in Guantanamo. I am proud to live in a country where my Commander-in-Chief can order me to perform such a challenging mission. My colleagues, prosecutors, and defense lawyers alike are patriots who love their country. We are taught in the military to perform our duties with honor, courage, and commitment. And I am here today doing my duty to talk to you about my client's indefinite detention in Guantanamo Bay.

My client has now been detained by our Government for over 10 years. After 5 years of detention, in 2008 he was charged with material support for terrorism. In 2009, the military commission process halted, and the charges against him were dismissed.

A recent D.C. Circuit Court decision, *Hamdan v. United States*, held that material support for terrorism is now no longer a crime that he or anyone detained prior to 2006 can ever be tried for in a military commission.

I am not here today to ask for sympathy for a man I was ordered to represent, but I would like to tell you a little bit about him.

He is an Afghan citizen with a third grade education received in a Pakistani refugee camp his family went to after fleeing the Russian invasion. He was roughly 22 years old when he was detained, although he does not know his exact age. He has a son who was

6 months old when he last saw him in 2003, and he has never been charged with harming anyone, either Afghan or American.

Had my client been brought to Federal court instead of Guantanamo, he could have and would have been tried years ago. Since 9/11, nearly 500 terrorists have been convicted in Federal courts; in the Guantanamo military commissions, six. Now, after a decade of detention with no crime he can be charged of, he sits in Guantanamo, imprisoned indefinitely.

My client has asked me how it is possible for my Government to detain him for over 10 years without proving he committed a crime. I try my best to explain that there are people in our Government who believe under the laws of war we are allowed to detain people indefinitely until the war is over. He then asks me, "You will no longer be at war with Afghanistan after 2014. Can I go home then? Or does this war never end?"

As a servicemember and an attorney sworn to uphold the Constitution and our strong legal traditions, I do not have good answers for him.

If my client is guilty of a crime, he should be tried and given his day in court. So I thank this Committee for your willingness to listen to a story today. For as long as he is in Guantanamo, no judge or jury ever will.

We are a Nation of laws and a people of principle. Denying my client a trial and detaining him indefinitely is at odds with our oldest values.

On the eve of our Revolutionary War, we held trials for British soldiers responsible for the Boston Massacre. Our founding father John Adams served as one of the British soldier's defense lawyers. But today even basic due process in Guantanamo is denied, including the opportunity to confront your accusers, be presented with evidence against you, and have access to counsel.

Our threats are real. Criminals and terrorists should be prosecuted and jailed. Our enemies must know that we will bring them to justice, no matter what. But as a people guided by principle and the rule of law, we can do better than indefinite detention.

For centuries, American servicemembers have fought and paid the ultimate sacrifice to protect the fundamental values that define our Nation. We should strive to always be faithful to those values, especially when it is most challenging to do so.

[The prepared statement of Lieutenant Fryday appears as a submission for the record.]

Chairman DURBIN. Thank you, Lieutenant.

The last witness on the panel is Elisa Massimino. She is the President and CEO of Human Rights First and an adjunct professor at Georgetown University Law Center. Human Rights First is one of the Nation's leading human rights advocacy groups, and Ms. Massimino and Human Rights First have been great partners with this Subcommittee working on our human rights agenda. Before joining Human Rights First, Ms. Massimino was a litigator in private practice and taught philosophy, earned her J.D. from the University of Michigan, master of arts in philosophy from Johns Hopkins, and graduated Phi Beta Kappa from Trinity University in San Antonio.

Ms. Massimino, you have testified before the Subcommittee before, and I welcome you back. Please proceed.

STATEMENT OF ELISA MASSIMINO, PRESIDENT AND CHIEF EXECUTIVE OFFICER, HUMAN RIGHTS FIRST, WASHINGTON, DC

Ms. MASSIMINO. Thank you. Chairman Durbin, Ranking Member Cruz, and Members of the Committee, thank you for the opportunity to testify today about the importance of closing Guantanamo and how we can do so in a way that protects our country, our national security, and our values.

As the president of an organization whose central mission is to advance American global leadership on human rights, I focus on ensuring that our country remains a beacon to freedom-seeking people around the world and that it can continue to lead by the power of example. That is why, after the terrorist attacks on our country, we joined forces with more than 50 retired generals and admirals, led by former Marine Corps Commandant Chuck Krulak and former CENTCOM Commander Joe Hoar who believed that our values and institutions are assets in the fight against terrorism, not liabilities.

I have been to Guantanamo and met the dedicated people serving there under difficult circumstances. We have been official observers to every military commission convened at Guantanamo since its inception. We know and have great respect for the servicemembers and civilian defense lawyers who are struggling to navigate this untested and jerry-rigged system to wring some form of justice from it.

Some would have you believe that Guantanamo's critics are a handful of human rights activists, some foreigners, and defense lawyers for detainees. That is not true. The loudest and most persistent calls to close the prison come from our own senior defense, law enforcement, intelligence, and diplomatic officials, people with a 360-view of the costs and benefits of Guantanamo who have concluded that our national security is best served by closing it.

President Bush said he wanted to close Guantanamo. Henry Kissinger called Guantanamo "a blot on our national reputation." Jim Baker said it has given America a very, very bad name. Admiral Dennis Blair, former Director of National Intelligence, called Guantanamo "a rallying cry for terrorist recruitment and harmful to our national security." Secretary Gates told President Bush that Guantanamo was a national security liability and advised him to close it down. Major General Michael Lehnert, as you have said, who was in charge of standing up Guantanamo in 2002, said it cost us the moral high ground. Former Chairman of the Joint Chiefs Admiral Mullen said that Guantanamo has been "a recruiting symbol for our enemies." General Colin Powell said he would close it "not tomorrow; this afternoon." And Senator McCain has suggested that it would be an act of moral courage to find a way to shutter the prison.

Whatever one thinks about the initial benefits of detaining prisoners at Guantanamo, there is growing bipartisan consensus that we no longer need it. Today's hearing catalogs the reasons why it is imperative to transform this consensus into action. We heard about the astronomical costs of Guantanamo at a time when the

Pentagon is furloughing more than half a million employees. General Eaton reminded us that the impending end of combat operations in Afghanistan will require a change in detention authorities. General Xenakis described the deterioration of morale at Guantanamo and the degraded mental state of many of the prisoners, a combination that is leading to a tipping point. And Lieutenant Fryday told us how Guantanamo has warped our system of justice.

In many ways, the struggle with Al-Qaeda is a war of ideals. That is the battleground on which our country should have the greatest advantage. Sometimes when we lose our way, outsiders who admire our values can remind us of who we are and what we stand for. Some family members of Guantanamo detainees have written letters to you in advance of this hearing, and I want to quote from them.

Ahmed Hadjarab, the uncle of an Algerian who has been detained for more than a decade without charge and has been cleared for release, wrote, "When in 2002 I was told that Nabil was detained by the Americans, I thought that at least he would have a right to a fair trial. I thought his rights would be respected and that justice would prevail. What I feel today is mostly incomprehension. How can this Nation, one that prides itself on defending human rights, close its eyes to these violations of its founding principles?"

Hisham Sliti from Tunisia has been held for more than a decade without charge. He, too, has been cleared for transfer. His mother wrote, "I do not understand why my son is still in Guantanamo after all these years when we know he has been cleared. We never thought the United States was the kind of place where people could be held like this."

We have often talked about who we are as a Nation, but sooner or later who we are cannot be separated from what we do. As we wind down the war in Afghanistan, we must expunge the legacy of Guantanamo and restore America's reputation for justice and the rule of law. The question is not why or if, but how.

Today Human Rights First has published a comprehensive exit strategy with a detailed plan for closing the prison. Among the challenges facing our country today, closing Guantanamo is far from the most complex. While it may be politically complicated, as Senator McCain recently said, it is not rocket science. It is a risk management exercise, and the risk is manageable. With leadership from the President and Congress we can get this done.

Thank you again for convening this hearing and soliciting our views. We are deeply grateful for your leadership, Mr. Chairman, on this and so many other human rights issues. I look forward to your questions.

[The prepared statement of Ms. Massimino appears as a submission for the record.]

Chairman DURBIN. Thanks, Ms. Massimino.

Now we are going to have rounds of questioning of 7 minutes per Senator, and I ask that each Senator try to stick with those time limits, if they can. And, again, I thank the panel.

Let me start at the beginning. Marion, Illinois, is a small town, small city in southern Illinois. It is a great town, and in a rural

setting, and it has a Federal prison, the Marion Federal prison. Incarcerated in that Federal prison are convicted terrorists. I have never heard one word from a person living in Marion, Illinois, about a fear associated with those terrorists being in that prison. The notion at Marion and at other places where Federal prisons exist is that our Federal prisons are pretty good. People do not escape from them. And the community around them feels pretty safe.

So, Mr. Gaffney, the notion of sending the worst of the worst to the Florence supermax prison 30 miles away from any city in the middle of nowhere, where they can have little or no communication with the outside world, why does that frighten you?

Mr. GAFFNEY. Senator, I am concerned, as I said in my testimony, about several things. One is I think there will be more violence inside the prisons. Second, I think that we cannot be sure, but I think it is a safe bet on the basis of experience elsewhere that when—

Chairman DURBIN. Excuse me. Have you been inside a supermax prison?

Mr. GAFFNEY. I have not personally had the privilege of being inside a supermax prison.

[Laughter.]

Chairman DURBIN. Please. I have visited a similar facility, and most of them are in a very restricted, lock-down condition. It is rare for them—

Mr. GAFFNEY. As they should be.

Chairman DURBIN [continuing]. To have more than 1 hour a day outside of the detention facility and then usually by themselves. So how do you believe that they will be able to incite problems within the Florence supermax prison?

Mr. GAFFNEY. I am so glad you asked that, sir. One of the things that is concerning me is what we are seeing done in the prisons writ large now, not just the supermax, but I think it includes the supermax, and that is this proselytization, the fact that we have imams who are brought in for the purpose of, I believe, catering, of course, to the Muslim population but in the process also converting and promoting this doctrine, which does conduce to violence. There is no getting around it. It is supremacist in character.

So you have to assume that there will be opportunity, especially if we start, as we have done with the Shoe Bomber, relieving them of some of the limitations on their freedom of movement—

Chairman DURBIN. Mr. Gaffney—

Mr. GAFFNEY. Then you will get, I think, more violence. But if I may come to the question of the community—

Chairman DURBIN. I am sorry, but I have a limited amount of time. I just want to say—

Mr. GAFFNEY. May I just say on the community, sir?

Chairman DURBIN [continuing]. We have now incarcerated in Federal prisons Moussaoui, a person we suspected to be part of 9/11, being held with no hint of problems within the prison or outside of it. I also want to make something very clear for the record. There are some very patriotic Muslim Americans who do not want to be characterized as part of an extremist movement. They are people who we have met and worked with every day—

[Applause.]

Chairman DURBIN [continuing]. And the notion that bringing in an imam or someone associated with their religion is an invitation to violence and extremism presumes the prison authorities will pay no attention, number one, and presumes perhaps that everyone brought in is a danger. And I think that is——

Mr. GAFFNEY. May I very quickly respond, sir?

Chairman DURBIN. Of course.

Mr. GAFFNEY. One is that the fellow who started the Muslim chaplains in the Federal prison is now in the Federal prison himself, Abdul Rahman al-Amoudi. He is a terrorist. He is a man who created, among other things, an infrastructure inside the United States for promoting Shariah through the Muslim Brotherhood.

But on your question is critically important: Will Marion be at risk if they take prisoners from Gitmo? I am concerned that they might be, not least because, quite apart from whether they could ever spring people from the supermax facility, it makes it a target for terrorism. It is an opportunity to——

Chairman DURBIN. Mister——

Mr. GAFFNEY. Create——

Chairman DURBIN [continuing]. Mr. Gaffney——

Mr. GAFFNEY. A spectacular incident, and that is what these guys are about.

Chairman DURBIN. Mr. Gaffney, there are domestic gang members and leaders of extremist groups from all over the United States incarcerated in these prisons, and they are handled very professionally and securely so that communities beg for the opportunity to have a Federal prison constructed near them.

Let me move to the question, Ms. Massimino. I believe the President should move, according to his promise, to close Guantanamo. But I also believe that Congress has made that exceedingly difficult with restrictions that we have put in place in terms of the transfer of these detainees. Would you comment on those restrictions?

Ms. MASSIMINO. Yes, I would be happy to do that. I also would like to say one word about the Federal prisons, because I had some of the same questions, and I understand that many people have these anxieties. So I reached out to the American Correctional Association and asked them what they thought about whether they could handle these kinds of prisoners, and they asked me, “Do you know who is in there now? These are not nice people. But we know how to handle this. We have got this.” As Senator Graham said, it is absurd to think that our corrections officials cannot handle this population.

You are absolutely right, Senator, that Congress has made closing Guantanamo more difficult because of these transfer restrictions, and I was happy to see that the Senate defense authorization bill has included some provisions that would give greater authority to the Commander-in-Chief to dispose of the prisoners at Guantanamo in the way that he thinks best fits our national security. And I hope those provisions become law.

We also, in our exit strategy document that we released today, break down the population at Guantanamo. It is essentially about the math. We have 166 people. The majority of those have been cleared for transfer. The President has now appointed a leader at the State Department to take on this challenge, and we are await-

ing the appointment of a leader at the Defense Department to do the same. There is renewed urgency about this, as you heard from Senator Feinstein about what is going on down there with the hunger strikes.

So this is something on which the President and Congress have to work together. Presidential leadership is essential, but Congress needs to trust the Commander-in-Chief to make these decisions.

Chairman DURBIN. Lieutenant Fryday, thank you for your compelling testimony. Thank you for your service to our country, and thanks for reminding us what we are all about in this country when it comes to the rule of law. That reference to John Adams is one that just stands out in this man's biography. Before he was elected President, he was assigned to defend British soldiers who were accused of massacring American colonists. It is an indication of where we started as a Nation and where we need to continue.

You have had a foot in both camps. You have been a prosecutor in our criminal justice system at the Federal level, and now you have been a defense counsel when it comes to military commissions. Some in Congress argue we just cannot trust Article III courts. If we give somebody a Miranda warning, they are going to clam up and will not even talk or cooperate, while others point to the record that over 500 accused terrorists have been successfully prosecuted in Article III courts and six before military commissions.

What is your view about the proper place, the proper tribunal for these trials?

Lieutenant FRYDAY. Thank you, sir, very much for the question and your comments. I do not believe it is my job to provide a recommendation to this body or this Committee. It is not what I have been assigned to do and ordered to do.

I can say, having been in Guantanamo and seeing the commissions up close, it has been 12 years since 9/11, and we are still litigating what kind of clothes people can wear in court, what kind of notes lawyers can take in meetings, and what rights apply. It is a very confusing system. It is a very slow, inefficient system. It is obviously—as the numbers you indicated, it is a much slower system than Federal courts.

There are still a lot of barriers in place in the military commission system, barriers for counsel, issues of attorney-client privilege, issues of classification that are confusing, hearsay rules that are relaxed in the military commission system that is different. So there are lot of differences that still need to be worked out as we move forward.

Chairman DURBIN. Thank you very much.

Senator CRUZ. Thank you, Mr. Chairman. I would like to thank each of the witnesses for coming here and for your testimony.

It seems to me this is an issue that inspires a great deal of passion, a great deal of emotion. And it also seems to me that our national security policy should not be derived simply from bumper-sticker ideology but, rather, from careful, hard decisions about how to protect the national security of the United States.

There are two facts in particular that I think are hard facts that I heard very little discussion of from the panel today. The first is, as of January 2013, the Director of National Intelligence in the

Obama administration has confirmed or suspects that 28 percent of former Guantanamo detainees re-engaged in terrorism. Now, that is a very inconvenient fact for any argument that would leave a substantial risk of these individuals that are currently in Guantanamo being released.

The second fact is underscored by timing this week, which is on Monday of this week, about 500 prisoners, including senior members of Al-Qaeda, escaped from the Abu Ghraib prison, which is now controlled by the Iraqi security forces. I think that likewise underscores the inherent risk in relying on foreign facilities to detain known terrorists, particularly terrorists for whom there is a substantial risk of their re-engaging in terrorism if they find themselves at large.

The first question I would like to ask is to General Eaton. General Eaton, I thank you for your many years of service and leadership. There are, as of November 2012, 166 detainees in Guantanamo. Is there any reason to believe that if those individuals were released, their recidivism rate would be any less than the Guantanamo detainees who have already been released who have re-engaged in terrorism at a rate of 28 percent, according to the head of the DNI?

General EATON. Senator Cruz, thank you for the question. I spent a career managing risk. Soldiers never get all the assets they need to buy risk down to zero. The question, I believe, could also be posed: Is the existence of Guantanamo a higher risk than the release of the prisoners we have there now?

We have a terrific judicial system. Our intelligence architecture reveals a 28 percent recidivism rate. If we accept 28 percent, then we have that same intelligence architecture that will help us buy down the risk of placing those individuals back in the care of countries that will take care of them, which is a requirement that this body has imposed upon the Secretary of Defense, a certification process.

So when we talk about releasing the 86 that are cleared for release under conditions that meet the expectations that the Secretary of Defense has to certify, then I think it is appropriate, and I think that the risk associated with that is indeed relatively low. It is not zero. But I live in a world, a military world, that accounts for risk, and you buy the risk down with every factor available to you, and America has a great deal to help buy down that risk.

Senator CRUZ. General Eaton, if I understood your answer correctly, it was that if detainees are released, we can act to mitigate the risk of their re-engaging in terrorism. I would note that it seems to me you did not dispute the premise of my question that these individuals, if released, we could expect to re-engage in terrorism at at least the same rate. And, in fact, I would suggest to you surely it was not the case that the people we released initially were the most dangerous. Under any rational system, presumably the first people released were those we deemed to be the least dangerous. And so the rational inference would be those remaining would, if anything, return to terrorism at a higher rate not a lower rate than 28 percent.

General EATON. Senator, as Yogi said, predictions are really hard, especially if it is about the future. And we have got a popu-

lation that is unknowable to 100-percent prediction rate. So, again, we mitigate risk. We buy it down. It will not go to zero. But I cannot put a figure on it.

Senator CRUZ. Well, with respect, General, it will go to zero with respect to those detainees if they remain detained. I mean, we are talking about the risk of future acts of terrorism. And let me say more broadly to the panel, at the outset I noted what I thought was the most difficult question, which is, it is easy to say close Guantanamo and get an applause from various audiences. The harder question then is what do you do with these terrorists. And it seems to me there are one of two options. You either send them to U.S. detention facilities—now the Chairman has generously volunteered Marion, Illinois, to host these terrorists. I do not know what the citizens of Illinois would think of that. I feel confident I know what the citizens of Texas would think about their coming to Texas.

I would note we have had multiple instances of individuals in Federal prisons engaging in terrorism, directing terrorist acts from Federal prisons, including the Blind Sheikh; Lynne Stewart was convicted for aiding terrorism for individuals in Federal prison. Or the alternative is to send it to foreign locations, whether it is nations like Yemen, with enormous instability, or other allies. And given the escape we just saw in Abu Ghraib, it is hard to have any confidence that if these individuals are sent to a foreign facility that they will not in due course be released and in due course commit future acts of terrorism, taking the lives of innocent Americans.

I want to close with a final question, which is, Mr. Gaffney, it has been reported that the President—under the Obama administration, approximately 395 people have been killed by drone strikes. Are you aware of any reasonable argument that it is somehow more protective of human rights, more protective of civil liberties, to fire a missile at someone from a drone and kill them than it would be to detain them and interrogate them, determine their guilt or innocence, and determine what intelligence might be derived from that individual?

Mr. GAFFNEY. Mr. Chairman, one housekeeping item. I think I neglected to ask if my entire statement could be put in the record. Chairman DURBIN. It certainly will be.

Mr. GAFFNEY. And there is also a short letter from a number of distinguished military officers that I would like to have in the record as well.

Chairman DURBIN. Without objection.

[The letter appears as a submission for the record.]

Mr. GAFFNEY. Senator Cruz, look, I am probably not the best arbiter of what is humane. You have people on this panel who spend a lot of their time dwelling on that. I kind of focus on national security. But just as a human being, I will tell you I think if you kill people, that typically is less humane than incarcerating them. Letting them starve to death is, in my judgment, less humane than feeding them, involuntarily if necessary. But this is not my specialty, and I would defer to others who may have a higher claim on knowledge in this area.

Senator CRUZ. And we get no actionable intelligence from someone who has been killed by—

Mr. GAFFNEY. And that is where the national security piece comes in. Foreclosing the option to detain and interrogate people is, I would suggest, as I am sure Senator Feinstein knows, a real impediment to our ability to prosecute a war like the one that has been thrust upon us by people who operate with a very high regard for operational security.

To the extent that we deny ourselves unilaterally this ability by essentially foreclosing putting them anyplace where we can have those kinds of interrogations I think is—well, I said earlier, strong words, but I think it is a dereliction of duty on the part of the Commander-in-Chief.

Senator CRUZ. Thank you, Mr. Gaffney. Thank you, General and the panel.

Ms. MASSIMINO. Mr. Chairman, I wonder if I might respond to this question about recidivism that Senator Cruz raised.

Chairman DURBIN. Please proceed.

Ms. MASSIMINO. Because it is certainly a reasonable concern, as it is in the criminal context, as you heard. But the claim that 28 percent of Guantanamo detainees have “rejoined the fight” is highly misleading, and Defense Department officials have said that many detainees included in that category are merely suspected of having some associations with terrorist groups and may very well have not engaged in any activities that threaten our national security. But that does not mean that all the prisoners at Gitmo are somehow innocent farmers and that there is no risk.

I really think this question about recidivism has to relate to what is our overall objective. You know, a lot of the people at Guantanamo are precisely the kinds of targets that Al-Qaeda looks to for cannon fodder, and some of them could cause harm if they are released. But that does not make them any different from the hundreds of thousands of other angry young men throughout the Muslim world who believe in the same case. And there is, sadly, no shortage of potential suicide bombers.

Guantanamo does nothing to solve that problem. In fact, it probably makes it worse.

Chairman DURBIN. Okay. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I want to ask a question of Lieutenant Fryday, about in your past, did you serve as an intern in my San Francisco office, per chance?

[Laughter.]

Lieutenant FRYDAY. Proudly, ma’am.

Senator FEINSTEIN. Well, I am very proud of you, so that is what I wanted to say.

[Laughter.]

Senator FEINSTEIN. Isn’t it true that some of the 80 Gitmo detainees who have not been cleared for transfer now, as you have spoken, can only be prosecuted in a Federal criminal court because the charges of conspiracy and material support to terrorism are no longer available in the military commission? Is that not correct?

Lieutenant FRYDAY. That is correct, ma’am.

Senator FEINSTEIN. So what we are saying is for those, if there is no alternative prosecution in a Federal court, they remain without charge or trial until the end of time.

Lieutenant FRYDAY. Let me clarify, ma'am. Material support for terrorism and conspiracy is a charge that can be charged in Federal crime. So it is not something that can be charged in a military commission, but is a charge that is available to the Federal court.

Senator FEINSTEIN. But if you are going to keep them in Guantanamo, they cannot be tried by a military commission. Is that not correct?

Lieutenant FRYDAY. That is correct, ma'am. They cannot be tried.

Senator FEINSTEIN. So the only hope would be they would have to be transferred out to be tried in a Federal court.

Lieutenant FRYDAY. Either that or go through a meaningful process like the PRBs that have just been set up where our country determines that at some point they are no longer a threat, in which case they could be transferred if they meet the restrictions that have been—

Senator FEINSTEIN. Let us talk. See, I have believed from the days of Colonel Davis down there that the military commission is an ineffective instrument. How many cases have they actually tried?

Lieutenant FRYDAY. There have been six convictions in the military commissions.

Senator FEINSTEIN. And explain to us exactly what those six convictions are and who is still serving?

Lieutenant FRYDAY. So the six convictions were for—the names are Hicks, Hamdan, al Bahlul, Khadr, al Qosi, Noor—and Majid Khan. Because I did not serve on those trials, I do not know all the details of each case. We do know that Hamdan has since been overturned by the D.C. Circuit court for saying, as I described in my testimony, the charge that he was charged with, material support for terrorism—

Senator FEINSTEIN. Well, maybe I could give them to you then.

Hamdan received a 5-month sentence. He was sent back to his home in Yemen to serve the time before being released in 2009. In October 2012, the D.C. Circuit vacated his conviction for material support because the charge was not recognized as a violation of the international law of war.

Hicks was the first person convicted in a military commission. When he entered into a plea agreement on material support on terrorism charges in March 2007, he was given a 9-month sentence, which he mostly served back home in Australia.

Al Qosi pled guilty to conspiracy and material support. A military jury delivered a 14-year sentence, but the final sentence handed down in February 2011 was 2 years, pursuant to his plea agreement. He has returned to Sudan at the conclusion of his sentence in July 2012.

Noor Muhammed pled guilty to conspiracy and material support. A judge delivered a 14-year sentence, but the sentence will be less than 3 years pursuant to his plea agreement. Because of credit for time served, he could be eligible for release to Sudan in December of this year.

One last one, and there is a point. Omar Khadr pled guilty in a military commission to murder, material support to terrorism, and spying. He was sentenced to 8 years, but was transferred to

a Canadian prison where he will serve out his remaining sentence and be eligible for parole after he serves a third of the sentence.

Now, there are a couple more here, and one of them is your client.

Here is my point: The sentences were very few and very low, essentially, from the military commission. And I have sat here over the years and wondered: What are we doing? Why are we maintaining this farce of a military commission which really does not work? And we have had different people down there trying to make it work, but to the best of my knowledge, no one has been successful.

Last month, when I was down there, I saw a very spanking new courtroom with nothing scheduled to go forward. And it just seems to me that everything down there is so deceiving and is really a kind of untruth about the American way, about the American judicial system, about America's humanitarian treatment of prisoners. Force feeding is not humanitarian, and yet it goes on and on and on. There is no end to this war yet that we know of. So unless the facility is closed, it will continue to go on.

Do you have any other comment you would like to make, or General Eaton?

Mr. GAFFNEY. Senator, could I just make a quick comment, if I may?

Senator FEINSTEIN. Sure.

Mr. GAFFNEY. I think this question of whether it is going to go on and on goes back to the point that I was trying to make earlier. That is not entirely up to us. The President's saying that it has to end is only possible if we surrender, if we submit. And, specifically, this question of will there be more of this, you know, recruiting if we leave it open I think begs the question: Compared to what?

Senator FEINSTEIN. Sir—

Mr. GAFFNEY. Does it—does it get worse if you actually have more of these jihadists inspired by our submission? And that is what I am concerned about, ma'am.

Senator FEINSTEIN. I read the intelligence daily. I know what is happening. I also know that Guantanamo contributes nothing positively. It contributes nothing that a Federal prison could not do better. It contributes nothing that a Federal court could not do better. So—

Mr. GAFFNEY. But if we close it, that may contribute quite negatively, is my concern, to inspiring our enemy.

Senator FEINSTEIN. I profoundly disagree with you.

Mr. GAFFNEY. Understood.

Senator FEINSTEIN. I think it will send a signal that finally we have learned something. I saw the people there. The doctor is right. These are not robust specimens any longer. It is a very different picture, I think, than people imagine.

Doctor, do you not agree?

General XENAKIS. Yes, ma'am.

Senator FEINSTEIN. So—

Mr. GAFFNEY. Look at the prisoners coming out of Israel, ma'am, and how they are regarded and how they inspire jihadism.

Senator FEINSTEIN. We are not—

Mr. GAFFNEY. No, but it is a similar phenomenon, and that is why I call to your attention this Shariah underpinning of the war we are engaged in.

Senator FEINSTEIN. I hope someday you go take a look. In any event, I want to say thank you, Mr. Chairman. I appreciate being here.

Chairman DURBIN. Thank you very much, Senator Feinstein.

We have two House Members who were, unfortunately, delayed by votes, and I have never seen this happen in the Senate before. We are going to let House Members testify. How about that? This may bring this institution down, if nothing else has.

[Laughter.]

Chairman DURBIN. I am sure it will not, having served in the House.

We are honored to have Congressman Adam Smith in his ninth term, Ranking Member of the House Armed Services Committee. He has a very lengthy and impressive bio, which I am not going to read. I hope you understand. And Congressman Mike Pompeo, who is—he enrolled at West Point and graduated first in his class. I do not know how long you have been in Congress, Mike. How long?

Representative POMPEO. Thirty months.

Chairman DURBIN. Thirty months. So we are going to ask each of them to make a statement, and if the panel would not mind staying for just a few moments, so each of them would speak for 5 minutes, and then if there are any further questions from Senator Cruz or myself or Senator Feinstein.

Congressman Smith.

**STATEMENT OF HON. ADAM SMITH, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF WASHINGTON**

Representative SMITH. Thank you, Mr. Chairman, and I am honored that the Senate would have us over here. We should work together more often, I think all would agree.

I am just here to argue that we should close Guantanamo Bay, and a number of issues have been raised which are separate from that question. I am not here to argue that we should stop detaining and interrogating suspects or that we should even necessarily release any number of the suspects that are at Guantanamo. Those are difficult questions, and do not get me wrong, I have positions on that. I certainly think that the 84 inmates that we have designated for release as being acceptable risks should be released. But that is an entirely separate question from where we hold them. And the argument that I make is that Guantanamo Bay, you have to balance the cost and the benefit, and there is literally no benefit to keep Guantanamo Bay open. All of the arguments that I have heard about the necessity to detain and interrogate, the necessity to continue to fight the war, which I agree with completely, you know, the necessity to protect ourselves from our enemies, all of that can be accomplished by holding them within the United States. And it has just been stupefying to me the last several years the degree to which people seem to have become unaware of the fact that we already hold hundreds of terrorists in United States supermax prisons, including Ramzi Yousef, the Blind Sheikh,

Abdulmutallab, many notorious Al-Qaeda operatives. We continue to do that right here in the U.S., safely, efficiently, and, I might add, very much more cost-effectively.

Number one, the average cost of an inmate is estimated at \$1.5 million a year in Guantanamo. Now, there will be transition costs to shut down Guantanamo and open up here. But in the long run, there is no question that it is cheaper to hold them here in the U.S. than it is in Guantanamo.

So the question is: What is the benefit of keeping that prison open? There is absolutely none. There has been spurious arguments made about somehow more constitutional rights will apply if they come to the U.S., when the Supreme Court has already ruled that Guantanamo is treated like the U.S., that is why they granted habeas under the people in Guantanamo. There are no greater constitutional rights here in the U.S. than out there. There is no benefit.

So what is the cost? The cost I think is, well, number one, the cost, the sheer amount of money that we have to spend to maintain this facility. But understand how the international community looks at Guantanamo. It was opened in the first place as an effort to get around the United States Constitution. It was the hope that if we held them outside of the territorial United States, we would not have to abide by those pesky constitutional values and rules that we hold so dear in this country. And the world knows that, and it is an international eyesore as a result.

Now, as it turns out, as I said, the Supreme Court said, "Nice try, but you are effectively in control of them, so the Constitution does, in fact, apply."

But Secretary Gates, George W. Bush, John McCain, many hard-core Republicans, who I think would take a back seat to no one in prosecuting this war, have said that we need to close this prison because it is hurting us with our allies and is inspiring our enemies.

Now, I am not naive. I am not going to tell you that the only reason Al-Qaeda attacks us is because of Guantanamo Bay. Far from it. But it certainly stands out there as one recruiting tool that, again, is wholly unnecessary.

So what I propose—and I proposed an amendment on the House side—is for an orderly way to close the prison. The President has also put out a plan—I know he has occasionally been accused of not having one, but I actually have it in my file folder right next to me—for how we should go about Guantanamo Bay. And, again, it is not even about recidivism or any of these other—those are arguments that you can have separate. This argument is not about whether or not we should hold them. It is about where we should hold them. And holding them in Guantanamo Bay hampers our efforts to successfully prosecute the war against Al-Qaeda. It continues to be a piece of evidence that our allies use to say, well, we do not want to cooperate with the U.S. because we do not like the way they implement their Constitution, we do not like the way they treat prisoners. That hampers our ability to successfully prosecute this war.

And the only argument that is left hanging out there is somehow we cannot safely hold these people in the U.S. And, again, I find

that argument to be patently ridiculous because we are safely holding hundreds of terrorists, not to mention mass murderers and pedophiles and some of the most dangerous people in the world.

If the United States of America is incapable of successfully holding a dangerous inmate, then we are all in a world of hurt, Guantanamo or no Guantanamo. And I hope we understand that.

And, also, the notion that this will somehow inspire Al-Qaeda more, I hate to tell you, but Al-Qaeda is sufficiently inspired right now. They are doing everything they can to attack us. And I applaud the various efforts that we have put forth to stop them. But the idea that instead of having 400 terrorists inmates we have maybe 484 in the U.S. is going to somehow massively increase the threat, well, it is just ridiculous on its face.

There is no benefit. The cost is great. Let us get around to closing Guantanamo as soon as we can.

[The prepared statement of Representative Smith appears as a submission for the record.]

Chairman DURBIN. Thanks, Congressman Smith.
Congressman Pompeo.

**STATEMENT OF HON. MIKE POMPEO, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF KANSAS**

Representative POMPEO. Thank you, Chairman Durbin, thank you, Ranking Member Cruz. It is an honor as a Member of the House to be here with you today. I agree with Mr. Smith only so far as that Al-Qaeda is absolutely very much inspired.

I was at Guantanamo Bay this past May, and I want to dispel a couple of facts right up front about the situation on the ground.

First, every American should be proud of the integrity shown by those U.S. military personnel caring for these detainees. Their work is difficult, but they bring the highest honor and care to the work they do there with the members of Joint Task Force Gitmo.

Second, there are no human rights violations occurring at Guantanamo Bay. There is no doubt that the detainees are held in conditions——

[Audience outburst.]

Representative POMPEO. That meet or surpass the standards——

[Chairman gavels to order.]

Representative POMPEO. Thank you. There is no doubt that the detainees are held in conditions that meet or surpass the standards provided for under the Geneva Conventions. In fact, given the safe and secure environment that Gitmo provides, most detainees maintain significantly more freedom of movement and activity than they would in a maximum security U.S. prison. They have access to gym equipment, educational materials, entertainment, and top-rate medical and dental care. The health care matches the level of the care received by our U.S. military personnel.

I would be remiss, given the situation, if I did not talk a little bit about the current hunger strike there. This is a political stunt. It is orchestrated or encouraged at least in part by counsel for the detainees and should not be rewarded. Claims that the efforts by our guards to force-feed those Gitmo detainees currently refusing nutrition are inhumane and should be ceased are simply wrong. The methods used by military personnel to feed those detainees

who wish not to feed themselves meet court-approved standards and are carefully monitored by medical personnel and those in command. It is right to continue to provide these detainees nutrition.

I want to talk about the constitutionality of Gitmo. Some folks continue to question it. We have to start with the basic fact. We continue to be at war with Al-Qaeda and associated extremist groups who daily seek to kill Americans. As long as these groups fight us, we remain at war. And as the Supreme Court made clear in *Hamdi* and as courts have confirmed many times since, the capture and detention of enemy combatants is a necessary incident to the conduct of this war. There is no question about the constitutionality of the detention at Guantanamo Bay.

Let us talk about the merits, the policy concerns surrounding it. First of all, current detainees have been off the battlefield for some time, yet they may well continue to provide valuable intelligence to U.S. intelligence collectors. But we should not focus just on those who are there today. As I said, we are still engaged in a counterterrorism battle all around the globe. The continued need to have a secure location in which to detain captured enemy combatants remains. The intelligence collection that can occur at these locations is enormous and central to our efforts to continue to identify, capture additional enemy combatants, and, in fact, defeat our enemy.

I just returned from a trip to Afghanistan as well, and I can assure you that there are many folks there that the options would either be to kill or capture, and we will serve our national security interests far better if we are able to capture them.

We talk about options. What are the alternatives? We could release Gitmo detainees to third-party countries. But as I heard Senator Cruz speak about, we have a very high recidivism rate. Whether it is 10 percent or 15 percent or, as the studies have shown, one-quarter of those detainees, I can assure you that we will have American servicemembers killed as a result of releasing detainees from Guantanamo Bay.

Indeed, just within this past week, Al-Qaeda conducted a major attack on two facilities in Iraq, releasing 500, some of whom were senior Al-Qaeda warriors. The transfer to third parties is simply not a reasonable solution to keeping America safe.

Moreover, transfer to third parties also presents another risk, a human rights risk, namely, that the nation to which we send those detainees will torture those folks. We cannot permit that.

Second, the other option is to bring them back to the United States. Twice within the last 48 hours in the U.S. House of Representatives, Members have offered amendments to the defense appropriations bill. Twice those bills have been defeated. The American people and their House of Representatives understand that bringing these detainees back to the United States is not a workable solution.

Last, I want to talk about the damage that has been done to national security as a result of this administration's policies and rhetoric surrounding Guantanamo Bay.

After over 4 years in office, the President continues to insist that we pursue a political goal and then, later, figure out a way to meet the real mission. The President knows, he knows full well—indeed,

he has spoken about it—that not all of those prisoners are in any way, shape, or form transferable or returnable, including the 9/11 five. No one believes they are going to come back, including this President, yet he continues to use the rhetoric of Guantanamo Bay closure.

You know, the President seems far more concerned in my judgment with mollifying the grievances of Al-Qaeda than defending against the real dangers these enemy combatants pose to the American people. By insisting on a catch-and-release counterterrorism strategy or a kill terrorism strategy, the President continues to do great harm to America's national security interests.

Thank you for the time today. I yield back.

[The prepared statement of Representative Pompeo appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Congressman.

Senator Whitehouse, do you have any questions of the panel or Congressmen?

Senator WHITEHOUSE. I had a question for the panel. Just a moment of background on it. I grew up the son of a Foreign Service family and spent a certain amount of time in Africa and Southeast Asia and was, I felt, the beneficiary of the good will and good example that my country represented around the world. I never was able to articulate it very clearly until I heard President Clinton, who is a master articulator, say that the power of our example as Americans has always been more important in the world than any example of our power. And I recently ran across Daniel Webster's first Bunker Hill Memorial oration from 1825, where he said, "The last hopes of mankind therefore rest with us"—meaning Americans. "And if it should be proclaimed that our example had become an argument against the experiment"—the "experiment" being our experiment in democracy—he continued, "the knell of popular liberty would be sounded throughout the Earth."

So I would just like those of you who represent our country overseas to react to those thoughts and explain where in the range of hard military power, soft economic power, and diplomatic persuasion you think the example that America presents to the world stands in the assets that we bring to bear to support and defend our interests around the world.

General EATON. Senator, my name is Paul Eaton, and thank you very much. Human Rights First has stenciled on their wall a quote from one of my favorite Presidents, Dwight Eisenhower: "Whatever America hopes to bring to pass in the world must first come to pass in the heart of America."

Do we want America to be represented by a young man with an M4 carbine? Or do we want America to be represented by a man who flew back with me from Africa who had just built a very large industrial chicken farm in an African country?

And I will tell you that as a soldier, I would far better want representation by a man who knows how to bring agricultural expertise than my sons and daughter with rifles overseas.

So we are far better served by our economic prowess and by our diplomatic prowess than by our extraordinarily fine military. Thank you.

Mr. GAFFNEY. Senator, I am not sure whether I qualify as one of your candidates for answering this, but if I may—

Senator WHITEHOUSE. You are on the panel. You can.

Mr. GAFFNEY. I am. Thank you. I would just offer that the idealism that you have described and that the general has just referred to is certainly commendable, and I think it is something that we should strive for. And yet it has to be tempered by a certain realism, and that is, when you are confronting people who are not moved by our example and may be affected by our power, I think you need to be able to bring both to bear. And in this case, I had a colloquy—I think you were out of the room—with Senator Feinstein about this. I just have to return to it, if I may.

To the extent that an enemy like the one we confront today actually perceives weakness not as dissuasive or exemplary or desirable but as an inducement to violence against us, the dangers of making a miscalculation here, not because it is the way we would like things to be, but because it is the way our enemy perceives and responds to these things, submission is their goal. Our submission is their goal, and I guarantee you they will perceive the closure of Gitmo as evidence of accomplishing it.

Senator WHITEHOUSE. I just have to react to that because I have to disagree. George Washington led armies that left bloody footprints in the snows of Valley Forge with no certainty that their enterprise would succeed and that pledging their lives and fortunes and sacred honor would not put them at the end of a rope. And yet they did not torture Hessians when they caught them. They did not force-feed them. You can go on and on, through World War II, the example of Britain in the shadow of Hitler's Nazism, throwing out of their secure intelligence facility somebody who had the nerve to lay hands on one of their prisoners, partly because they knew it was bad practice in intelligence gathering, partly because it was not who they were. And we are still proud of the way Britain stood up against the Nazi menace even before we got into the war, when they stood alone, and Winston Churchill is going to be a figure in history because of that. And I think the fact that over and over again they refused to use those techniques is actually a measure of their strength. And you could just as easily make the argument that we are strengthening Al-Qaeda and our enemies by treating them as if they were more dangerous than Nazi Germany, more dangerous than the opponents of our American Revolution, and require us to veer from standards of decency and conduct that have characterized this Nation since its inception.

Chairman DURBIN. Senator Whitehouse, are you finished?

Senator WHITEHOUSE. I am.

Chairman DURBIN. Thank you. Before we adjourn this meeting—and I thank the panel and my colleagues—I would like to ask you to note one particular thing. Fifteen years ago today, at this moment, at 3:40 p.m., two of the officers of the Capitol Police were shot down and killed in the Capitol by a madman with a gun. They were Officer Jacob Chestnut and Detective John Gibson. And each year at this time, when the Senate and House are in session, we have a moment of silence in their memory, and I would like to ask all those who are in attendance to please join me, if you can, and stand for a moment of silence in their memory.

[Moment of silence.]

Chairman DURBIN. Thank you very much.

If there are no further questions, I have a script to read. Thanks again to my colleagues from the House for joining us here today.

There has been a great deal of interest in today's hearing. Many individuals and organizations submitted testimony, including Retired Brigadier General David Irvine, 26 retired admirals and generals supporting the closure of Guantanamo—the full list is going to be added in the record—Amnesty International, the Constitution Project, the National Religious Campaign Against Torture, the Center for Victims of Torture, Reprieve, Air Force Captain Daphne LaSalle Jackson, Tom Wilner, and my friend Tom Sullivan, the former U.S. Attorney for the Northern District of Illinois.

I would also like to note that two other attorneys, close friends of mine in Chicago, in addition to Tom Sullivan, Lowell Sachnoff and Jeff Coleman, are volunteer attorneys lieutenant representing detainees as well. They give extraordinary amounts of time in help bringing justice to this situation.

We also received more than a dozen statements from family members of those detained in Guantanamo Bay. I particularly want to thank the human rights organization Reprieve for their assistance in ensuring these individuals were allowed to share their perspective.

Without objection, I would like to place these statements in the record.

[The information referred to appears as submissions for the record.]

Chairman DURBIN. The hearing record is going to be open for a week to accept additional statements. Written questions for the witnesses will also be submitted by the close of business 1 week from today, no later. And we will ask the witnesses to respond promptly if they can.

If there are no further comments from our panel or colleagues, I want to thank the witnesses for attending and my colleagues for participating.

There is difference of opinion, obviously expressed today, and that is what this system of Government is all about, that we would come together with differences of opinion in a peaceful gathering and debate an important policy relative to our values and our security. And I think this Subcommittee, which has a responsibility to deal with issues involving the Constitution, human rights, and civil rights, has a particular responsibility to raise even these controversial issues on a regular basis. I am sorry that it has been 5 years since we have had a hearing on Guantanamo. I can guarantee you that, if it continues to be open, there will be another hearing very, very soon.

At this point this meeting of the Subcommittee stands adjourned.

[Applause.]

[Whereupon, at 3:44 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Human Rights

On

“Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications”

Wednesday, July 24, 2013
Hart Senate Office Building, Room 216
2:00 p.m.

Panel I

The Honorable Adam Smith
United States Representative (D-WA-9)
Washington, DC

The Honorable Mike Pompeo
United States Representative (R-KS-4)
Washington, DC

Panel II

Major General Paul D. Eaton
United States Army (Ret.)
Fox Island, WA

Brigadier General Stephen N. Xenakis, M.D.
United States Army (Ret.)
Arlington, VA

Lieutenant Joshua M. Fryday
Judge Advocate General's Corps
United States Navy
Washington, DC

Frank Gaffney
Founder and President
Center for Security Policy
Washington, DC

Elisa Massimino
President and Chief Executive Officer
Human Rights First
Washington, DC

CLOSING GUANTÁNAMO: THE NATIONAL SECURITY, FISCAL, AND HUMAN RIGHTS IMPLICATIONS

Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

Wednesday, July 24, 2013

Statement of Representative Adam Smith (D-WA)
Ranking Member, House Armed Services Committee

Mr. Chairman, Ranking Member Cruz, Representative Pompeo, and distinguished members of the Subcommittee, thank you for the opportunity to testify before the subcommittee about my plan to close the detention facility at Guantanamo Bay, Cuba.

I strongly support closing the detention facility located at Guantanamo Bay as soon as possible. Until the facility is closed, it will continue to be seen by the world as our attempt to avoid the rule of law. It undermines our moral standing in the international community. It also damages our efforts, both abroad and in the United States, to defend our values and protect human rights. In addition, it undermines our national security because our allies are less likely to share valuable intelligence with us and hesitate to send their detainees to the United States without a guarantee they won't be sent to Guantanamo Bay. Finally, it continues to serve as a rally cry and recruiting tool for our enemies.

The facility is also becoming increasingly expensive and the annual operating costs continue to grow. The Department of Defense is spending \$454.1 million on total costs for Guantanamo Bay detention operations in 2013, which is about \$2.7 million per detainee, compared to the average figure of \$34,046 required to hold a prisoner in a maximum security federal prison in the United States. The facilities at Guantanamo Bay were designed to be temporary and are rapidly deteriorating, requiring new temporary construction. As inmates age, significant medical upgrades are needed. This construction and medical upgrades will cost hundreds of millions of dollars and take years to complete.

Since June 2009, Congress has repeatedly made it impossible to close Guantanamo Bay by imposing a ban against using appropriated funds to transfer Guantanamo detainees to the United States. Congress has also placed severe restrictions on transferring detainees who have been cleared for transfer to a host country or returned home. Finally, Congress has banned the use of funds to construct or modify any facility in the United States to house detainees from Guantanamo Bay.

I have continuously opposed these actions by Congress that block the closure of the detention facility located at Guantanamo Bay. Our civilian law enforcement and justice systems have a proven track record of success in investigating and prosecuting suspected terrorists. Since September 2001, almost 500 individuals have been convicted in federal court of crimes related to

international terrorism and over 300 individuals are currently incarcerated in federal prisons within the United States for similar charges.

On June 14, 2013, along with Representative James Moran of Virginia and Gerald Nadler of New York, I offered an amendment to H.R. 1960, the FY2014 National Defense Authorization Act, that provided a comprehensive plan to close the Guantanamo Bay detention facility. This amendment, the Guantanamo Bay Detention Facility Closure Act of 2013, would 1) expedite and add to requirements for a comprehensive closure plans from the President and the Department of Defense; 2) enhance the authority of a senior Department of Defense official to implement the presidential plans for closure; 3) remove existing limitations on transfers; 4) strike current requests for construction at GTMO; 5) require notice and a comprehensive report to Congress prior to any actual transfers, and 6) end funding for the GTMO detention facility on December 31, 2014.

Unfortunately, the amendment failed by a vote of 174-249. While I was disappointed with the outcome of this vote, I will continue to work with my colleagues in the House, Senate, and the White House to close this facility. Detaining individuals at Guantanamo Bay was never a good idea. It is an even worse idea now. We should start the process to close the detention facility at Guantanamo Bay now.

Before I summarize my amendment, let me address several misconceptions about Guantanamo Bay.

First, security. It is often said by some that if Guantanamo inmates are brought to the United States, there will be regular security incidents. This is nonsense. As stated above, the federal Bureau of Prisons and our military have a proven track record for holding dangerous criminals and terrorists. We have already tried and convicted one Guantanamo detainee in the United States, Ahmed Ghalaini, without incident. I am aware of the letter by Mayor Bloomberg of New York City addressing security concerns and costs about terrorist trials in New York City. I agree that trying terrorists and providing adequate security is expensive, but it will be expensive wherever we try them. Anything is cheaper than the hundreds of millions of dollars we have already spent on the military commissions process. In addition, it is my understanding Mayor Bloomberg was primarily addressing the Khalid Sheikh Mohammed trial, which as we now know, will be tried in a military commission at Guantanamo. Finally, the numbers cited by the Mayor have not been vetted and were only estimates unattributed to any verifiable source.

Further, we house terrorists in the United States now without incident. We know al Qaeda wants to attack us, additional detainees in the United States won't change the equation.

Second, it is argued that detainees in the United States might receive additional constitutional rights. This is another false argument. As the subcommittee knows, the federal judiciary already supervises detainees at Guantanamo, through habeas corpus review. The Supreme Court has

already said our Constitution applies to Guantanamo Bay and no greater rights apply to detainees than to any other person.

In addition, regardless of whether a detainee is tried in federal civilian court or by military commission, the verdict is reviewed by the U.S. Court of Appeals for the District of Columbia, an Article III court. Each verdict may also be reviewed by the Supreme Court.

Third, it is argued that we obtain better intelligence by military interrogations at Guantanamo. This is another myth. We have successfully obtained robust intelligence from a long list of subjects captured and interrogated in the United States. The reality is, that wherever a suspect is interrogated, the most effective intelligence is obtained by the FBI, the intelligence community, and the military working together.

Finally, Guantanamo Bay does not have only the “worst of the worst.” While there are many detainees at Guantanamo Bay who are dangerous and should not currently be released, over 86 have been approved for transfer by a process that involves both the intelligence community and our military. These detainees have been individually assessed to be low level risks if transferred or released. This assessment has been done by our experts: military, intelligence and terrorism experts. There is always a risk in releasing a detainee, but as former Secretary of Defense Donald Rumsfeld stated, we can’t detainee everyone in a war. We know our military in the field in Iraq and Afghanistan routinely released many low-level prisoners after initial capture. I defer this issue to our military, which has always advocated releasing low-level threats.

Much more can be said about the issue of recidivism, but that is a separate issue from whether Guantanamo should be closed. I want to close Guantanamo Bay, but I am not advocating for the release of any detainee that remains a security threat to the United States.

Here is a summary of how the amendment would close the Guantanamo Bay Detention Facility by December 31, 2014:

1) Expedites requirements for comprehensive plans from the President and the Department of Defense on how to close GTMO (within 60 days of enactment) that are in the underlying bill (the NDAA): foreign transfers, prosecution, expedited periodic review of the status of detainees, and a plan for detention in the United States for any remaining detainees. The reports include:

- A report of the security situation in Yemen and the capacity of the Yemeni government to detain, prosecute, or rehabilitate, detainees transferred from GTMO (Section 1039 of H.R. 1960).
- A report on possible constitutional rights GTMO detainees might receive if transferred to the United States (Section 1040 of H.R. 1960).
- A report on former GTMO detainees who may have become leaders of foreign terrorist groups (Section 1040A of H.R. 1960).

- Expedites completion of a comprehensive Presidential Plan on GTMO closing pursuant to Section 2901 of H.R. 1960. This plan will include:
 - For possible foreign transfers: identification of eligible detainees, selection of possible foreign locations, and an assessment of the security and humanitarian conditions in each country.
 - Identification of locations for possible transfers to the United States of GTMO detainees. Includes an assessment of purchase and transfer costs, construction, modification and repair costs, personnel costs, security costs, prosecution costs, and identification of any other potential costs.
 - Requires additional reports:
 - Assessment of security costs for federal trials and Military Commissions in the United States for GTMO detainees.
 - Attorney General assessment of disposition options for GTMO detainees currently selected for prosecution.
 - Completion of all pending Periodic Reviews of the status of detainees.
 - A report providing a summary of enduring security threats in the detention facility at Parwan, Afghanistan (Section 1035 of H.R. 1960).
- 2) Enhances the authority of a senior official in the Pentagon (pursuant to Section 1037 of H.R. 1960), who will be appointed by the President and given the authority to implement the above plans. This official must work with the intelligence community, the Department of Defense, the Joint Chiefs of Staff, the Department of State and other interested Departments.
- Pursuant to the above plans, this official will coordinate the negotiation of transfer agreements with foreign countries if it is determined that transfer is in the national security interest of the United States and the detainee is no longer a significant threat to the United States.
 - Pursuant to the above plans, this official will coordinate Administration efforts to expedite the prosecution of all eligible detainees in federal court or in military commissions. These trials will occur in the United States or at GTMO. The ongoing military commission's trials will continue at GTMO. If they are not concluded by the end of 2014, they will continue at a secure location in the United States.
 - The official will coordinate a plan to transfer any remaining detainees to secure facilities (either military bases or enhanced Bureau of Prison facilities) in the United States until the termination of hostilities. They will not be in our civilian communities; they will be on secure facilities on military bases or federal prisons. These detainees will include the few detainees determined to be too dangerous to release or for whom there is not admissible evidence to prosecute. The legal basis for this continued detention is provided by the laws of war, which allow a nation in an armed conflict to keep the enemy off the battlefield. The status of these

detainees will be reviewed on a regular basis and they will have access to attorneys. The conditions of their detention will be transparent. Every effort will be made to prosecute these detainees or transfer them to an appropriate foreign country. However, no detainee who is considered a significant threat to the United States will be released until the current conflict ends.

3) All current limitations on the transfer of GTMO detainees in HR 1960 or existing statutes are removed. Sections 1032-34 of H.R. 1960 are removed. These sections ban the use of funds for the construction or modification of facilities in the United States for GTMO detainees, require certifications by the Secretary of Defense for transfer to foreign countries, and a ban on the transfer of GTMO detainees to the United States. Parallel restrictions in appropriations statutes and the current Continuing Resolution are also removed.

4) Strikes the request for \$247 million for military construction at GTMO in Section 2901 of H.R. 1960.

5) Requires 30 day notice to Congress and a comprehensive report prior to any transfer of a Guantanamo Bay detainee to a foreign country or to the United States for prosecution or continued law of war detention. The report includes an assessment by the Secretary of Defense and the intelligence community of security concerns about the individual. No transfer notice will be sent to Congress unless it is the consensus opinion of the military and intelligence communities that transfer of the detainee is appropriate.

6) Eliminates funding for the Guantanamo Bay detention facility by December 31, 2014.

Thank you again for the opportunity to appear before you today and I look forward to your questions.

**Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights
“Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications”
July 24, 2013
2:00 PM
Dirksen 226**

Congressman Mike Pompeo (KS-04)

Chairman Durbin, Ranking Member Cruz, Members of the Subcommittee, I am honored to testify before this Subcommittee.

The implications of closing the detention facility at Guantanamo Bay continue to be debated in both Chambers of Congress and throughout the country. As with any complicated matter, I believe policy makers should understand, and hopefully agree on, key facts before deciding on a course of action. I hope my testimony will contribute to a better understanding of the facts.

By way of background, after graduating from the United States Military Academy at West Point, I had the great honor of serving in the United States Army as a Cavalry officer for five years.

After my military service, I graduated from Harvard Law School—having served as an editor of its law review. I then worked as an attorney at the law firm of Williams and Connolly here in Washington before running two industrial companies in Kansas.

Today, I serve as a member of the House Permanent Select Committee on Intelligence.

The debate about the detention facility at Guantanamo Bay is not simply a question of treatment of enemy combatants. The continuation of GTMO is a critical component of America’s counterterrorism strategy

and how we set about the government's primary moral obligation—keeping Americans secure from enemy threats.

I. Today's Reality at the U.S. Facility at Guantanamo Bay, Cuba

To better understand the true nature of the detention facilities at Guantanamo Bay, I made it a personal priority to tour the facility, so I could observe the treatment of the detainees, first-hand. I did so in May of this year. The facts on the ground contradicted a number of myths:

A. The professionalism of our troops is beyond reproach.

Every American should be proud of the integrity shown by the U.S. military personnel caring for these detainees. Their work is difficult, but they bring the highest honor and care to every task.

B. The detainees are treated with respect and dignity.

Let me be clear: There are no human rights violations occurring at GTMO. There is no doubt that the detainees are held in conditions that meet or surpass the standards provided for under the Geneva Conventions. I have observed first-hand that the U.S. military personnel running the facilities make every effort to ensure that all detainees are treated well. In fact, given the safe and secure environment that GTMO provides, most detainees maintain significantly more freedom of movement and activity than they would in a maximum security U.S. prison. They have access to gym equipment, educational material, entertainment, and top-rate medical and dental care—health care that matches the level of care received by the U.S. military personnel who guard them.

I would be remiss here if I did not address the current so-called “hunger strike” at GTMO. This political stunt, orchestrated or encouraged at least in part by counsel for the detainees, should not be rewarded. Claims that the efforts by our guards to force-feed those GTMO detainees currently refusing nutrition are inhumane and should cease are simply wrong. Great care is taken by U.S. personnel to ensure proper nutrition for all detainees; the methods used by military personnel to feed those detainees who wish not to feed themselves meet court-approved standards and are carefully monitored by medical personnel and those in command.

And it is right that we do this—we feed these detainees because it is our moral duty to make sure those under the care of the United States continue to live healthy lives, without unnecessary pain and agony. It is equally important to our men and women in uniform who have volunteered to defend this country that they not have to endure unnecessary loss of life on their watch.

Finally, feeding these detainees is moral and necessary for another reason: Many detainees are likely pressured by other detainees to participate in the hunger strike, and thus do so largely against their will. I commend our military personnel who strive each day to ensure these detainees do not suffer from hunger or malnourishment.

Having now addressed the conditions on the ground today at GTMO, let me turn to the national security, human rights, and legal issues surrounding the detention facility.

II. Detention at GTMO is Wholly Constitutional

Many continue to question the constitutionality of the detention facility at GTMO and the continued detention of those housed there. Back to first principles—we remain at war with al Qaeda and associated extremist groups who daily seek to kill Americans and attack American interests and allies around the world. Our troops remain in the battlefield and our nation remains at risk. As long as these groups fight us, we remain at war. And as the Supreme Court made clear in *Hamdi v. Rumsfeld*, and as courts have confirmed many times since, the capture and detention of enemy combatants is a necessary incident to the conduct of war.

The men held at GTMO are our enemies, they have been given access to Article III courts to review the legality of their confinement, and many will soon face military tribunals for their acts. There is nothing unconstitutional about continuing detention at GTMO. As long as the United States remains at war with enemies who continue the battle they raged on September 11, 2001, the constitutionality of detaining those we capture in this fight cannot be seriously questioned

III. The Detention Center at Guantanamo Bay is Critical To American National Security and Must Be Kept Open

The detention center is critical to American national security. Every identified alternative presents real risks to those of us in America, civilians all around the world, and to our service members abroad.

A. Current Detainees Still May Provide Valuable Intelligence

Although current detainees have been off the battlefield for some time, they may well continue to provide valuable intelligence to U.S. intelligence collectors.

B. We Remain at War With Al Qaeda and Its Supporters And GTMO Is Important to Defeating Our Enemy

We are still engaged in a counterterrorism battle all around the globe. Our need of a secure location in which to detain captured enemy combatants remains. The intelligence collection that can occur at these locations is enormous and central to our efforts to use enemy combatants to identify, capture and defeat the enemy.

I just returned from a trip to Afghanistan and I can guarantee you that there are still scores and scores of radical and committed terrorists who want to do great harm to our troops, our country, and the American people.

This battle will be fought in one of two places: overseas where every American has the training and weapons necessary to accomplish their mission and return safely to their family; or on the streets of New York or Wichita, Kansas.

That's why it's so important to ensure that the number one priority is intelligence collection from the terrorists we do find. To do so, we must have a method of capturing them, a place to hold them, and a means of questioning them. A fulsome use of the safe and modern facilities at Guantanamo is the best mechanism available to achieve this priority.

C. Release or Transfer of All Detainees to Other Countries Will Result in Dead Americans and Risks Harm to the Detainees

We could release GTMO detainees to 3rd-party countries. If we did so, we can be confident that many will return to the battlefield and continue their war against Americans. Of the GTMO detainees released to date, over ¼ have returned to the battlefield. This presents an

unacceptable risk to the homeland and to our servicemen and women in the field.

Just this past week, Al Qaeda conducted an attack on multiple detention facilities in Iraq, resulting in the escape of many top terrorist leaders. This is just one example of the danger this approach takes. Many countries are simply incapable of ensuring the continued detention of these individuals. In addition, transfer to third parties presents a human rights risk—namely, torture—to detainees who are currently under our control.

D. Returning Detainees to the United States Presents an Unacceptable Risk and Americans Know It

The other option is that we can bring them to the United States, where the potential for endless litigation and rights expanded well beyond those afforded to enemy combatants, subjects Americans to the real possibility that terrorists might be released onto American streets.

This is a risk we can avoid if we have the courage to see the benefit of keeping GTMO open. I believe we owe it to the American people to avoid bringing terrorists into the country. We did not take the fight to the terrorists to bring the terrorists back to the United States.

IV. Dangers of Administration Policy & Rhetoric

Lastly, I want to comment on the way this Administration has conducted itself on this matter. The President decided to close GTMO before having a full understanding of the facts.

After over four years in office, the President continues to insist we pursue a political goal and then, later, figure out a way to meet that goal. The President knows full well that many detainees—including the 9/11

Five—are not transferable and not returnable to the U.S. Yet he continues to mislead the American people about the dangers and realities of closing this critical facility.

Members of Congress know this too. Just last night, the House of Representatives crushed an amendment to the Defense Appropriations bill that would have allowed the President to begin the closure of GTMO by a bipartisan vote of 247 to 175.

The President seems to be more concerned with mollifying the grievances of al Qaeda than defending against the real dangers these enemy combatants pose to the American people. By insisting on a catch-and-release counter-terrorism strategy, the President has communicated to our enemies that we lack the resolve to see this conflict to its end.

It is thus small wonder that terrorists have become emboldened. U.S. targets have been attacked more frequently in the last year than in the four years before 9/11.

V. Conclusion

So I close on this: The War on Terror is real. Guantanamo Bay serves the national interest of the United States. It is constitutional. It is no more a recruiting tool for terrorists than is their hatred for our way of life. Guantanamo Bay keeps Americans safe.

TESTIMONY OF MAJOR GENERAL PAUL D. EATON

BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND HUMAN RIGHTS“CLOSING GUANTANAMO: THE NATIONAL SECURITY, FISCAL AND HUMAN
RIGHTS IMPLICATIONS”

JULY 24, 2013

I. Introduction

Chairman Durbin, Ranking Member Cruz and Members of the Subcommittee, thank you for inviting me to be here today to share my views on closing the Guantanamo Bay Detention Center. My name is Paul D. Eaton, and I am a retired United States Army Major General. I served over thirty-three years as an infantry officer serving in command and staff positions in the United States and Europe, Somalia, Bosnia and in Iraq, culminating as the Chief of Infantry and Commander of the Infantry Center at Fort Benning, Georgia. My last operational mission was to establish and lead the command to design, man, train and equip new Iraqi security forces, including National Police, Border Troops, Army, Navy and Air Force.

The greatest challenge to me in developing Iraqi soldiers was to overcome obedience to three decades of despotism and instill adherence to the rule of law. We worked the problem rigorously in the classroom and by our display of personal example. We stressed the nature of personal discipline, of team, of initiative, and of self-reliance. We drilled daily the notion of civilian control of the military, military justice, prisoner management and battlefield discipline. We stressed that higher rank did not bring greater privilege, rather the opposite. We stressed accountability.

Then Abu Ghraib blew up on us. The day the Abu Ghraib story broke, my senior Iraqi advisor, a retired Iraqi Air Force Brigadier General, walked into my office, visibly upset, and said, “General, you have no idea how badly this will play on the Arab street – and in your command.” He turned on his heel, and walked out. That man was and is my friend, but his message was clear. The United States had sacrificed its ability to teach good order, discipline and morale when it had failed to follow the law itself by torturing Iraqis.

Abu Ghraib was the spawn of Guantanamo and one reason why I am convinced that Guantanamo should close.

II. How Guantanamo Veered Away From Military Doctrine and the Rule of Law

In January 2002, then Brigadier General Mike Lehnert took his command, JTF-160, to Guantanamo with the mission to construct and operate the detention facility for Taliban and Al Qaeda detainees. He ordered that the Geneva Conventions would apply, over the opposition of civilian leadership. He invited the International Committee of the Red Cross to visit and advise on detention conditions and appointed a Muslim chaplain.

General Lehnert's conduct was consistent with how we train our military to deal with our prisoners. Said a member of his command, Colonel Terry Carrico at the time, "The Geneva Conventions don't officially apply, but they do apply."

After MG Lehnert left, the Bush administration adopted guidelines that permitted torture, and cruel, inhuman and degrading treatment in contravention of the Geneva Conventions, the Convention Against Torture, the Uniform Code of Military Justice, and domestic and international law. The use of torture, which was later exported to Abu Ghraib, created the reputation Guantanamo holds internationally today: of an American Gulag where detainees were tortured and continue to be denied the legal due process for which the United States is normally so highly regarded.

The investigation of Abu Ghraib by Major General Tony Taguba, an American hero, found that torture implemented at Guantanamo was exported to detainee operations in Iraq. Abu Ghraib was a logical outcome of our Guantanamo experience. Men who had served in Guantanamo during the worst days of enhanced interrogation techniques were deployed to Iraq to "Gitmo-ize interrogations." That, along with failures in the chain of command, allowed a complete breakdown in discipline, resulting in the Abu Ghraib fiasco. The pictures of Abu Ghraib were seared into the world's consciousness, and devastated my mission to bring rule of law to Iraq and its soldiers and policemen, whose cynicism about American moral authority was significant.

Guantanamo cannot be buffed enough to shine again after the sins of the past. Improvements in detainee treatment and new military commission rules will not change the belief in the minds of our allies and our enemies that Guantanamo is a significant problem to the prosecution of the U.S. national security agenda in general and the U.S. military in particular.

III. How Guantanamo Has Undermined Our National Security

Let me explain how Guantanamo had undermined our national security. There are four elements of national power that contribute to our security:

- Moral leadership
- Political leadership
- Military power
- Economic power

A. The moral component of national power

First, the moral component of national power is essential to our armed forces and our national security.

In individual soldiers, we address the physical, the skill sets and the moral component. What sets the American Soldier apart from his or her international peers is the latter, and it is the easiest to develop. Our young men and women come into the service with a very

clear understanding and belief in the institutions that make America the great country she is. Our citizens have a fundamental belief in our Constitution and Bill of Rights and the judicial system that was established based on those documents. They have faith in their civilian leadership and the military leadership appointed by civilians. They have faith in their families, their society, their elected officials and the many faiths that inspire our men and women. My experience in developing soldiers in other countries revealed just how special we are, and how challenging development of the moral component can be in young men in many other countries on this planet.

Our moral component is one reason why we are so admired around the world. It is why we are the number one emigration choice on the planet. It is our rule of law that makes America the country of choice for day to day life, for safe development of families and to build a business. The U.S. judicial system really is our bright and shining gem and more than anything else, the justification for President Reagan's 'Bright and Shining City on the Hill.' In the armed forces, in the absence of a lawful order, we rely on, the Constitution, the Uniform Code of Military Justice, and the international treaties and conventions we have signed, as Brigadier General Lehnert demonstrated when he established the detention facility at Guantanamo.

When our leaders violate the rule of law, it makes our armed forces and our nation weaker. Guantanamo's reputation for torture and lack of due process of law cannot be rectified. Continued problems with the latest incarnation of military commissions make us look at once incompetent and hypocritical.

B. The political component of national power

The second component of national power is political and diplomatic leadership. Guantanamo has greatly strained our alliances.

We have a great many allies and alliances created for many reasons, most providing for mutual defense. Those alliances were entered into because of American national values and trustworthiness. Many of those same allies abhor the story of Guantanamo. My team in Iraq was composed of nine nations, military and civilian. In late night discussions, our Guantanamo problem would come up from time to time, and, after Abu Ghraib, often.

At the national level, our closest allies have refused to send us detainees because of Guantanamo. We are losing intelligence opportunities when this happens.

Those countries with a history of human rights abuses generally perform poorly on the international stage. The United States, during World War II, solidified its reputation as a leader in human rights by how it managed a very large prisoner of war population. Prisoners were housed in appropriate conditions and when interrogated, interrogated humanely. Marine Corps Major General Fred Smith, now unfortunately deceased, would tell the story about how Marines in his command accepted a Japanese soldier's surrender during operations on Iwo Jima and subsequent humane treatment and interrogation. The

return intelligence from that treatment proved invaluable. And the number of former German and Italian POWs who immigrated to the United States after the war carries a very powerful message. Guantanamo stands in sharp contrast to the leadership America has demonstrated in the past.

C. Military power is integral to our national power

Military power is the third component of national power. The United States Armed Forces are second to none in the world. Guantanamo makes us look weak, imperils our security, and forces our soldiers to bear an all-too-heavy burden.

First, Guantanamo makes us look weak, and it makes the enemy look strong. Let me explain. From a military perspective, some, but not all, of the prisoners in Guantanamo *may be* dangerous on an individual level, but they aren't an existential threat. They are not super villains. They are not organized, like our armed forces, to project violence. Releasing any individual Guantanamo detainee does not change our national security posture. That does not mean that we should release detainees who stand accused of war crimes. They should face justice.

To this soldier, the fear based argument to keep the Guantanamo Bay detention facility open is hard to understand. If brought to the United States for prosecution, incarceration or medical treatment, the detainees will pose no threat to our national security. The 86 men who have been cleared for transfer should be transferred. We must find lawful dispositions for all law of war detainees as we have done in every conflict.

Second, Guantanamo places our soldiers and nation at risk not only because it makes America look hypocritical as we promote the rule of law but because it makes the detainees look like warriors. Our leaders in Iraq would pose the question to me and my colleagues early and often, "Did we create more terrorists today than we managed to take off the street?" Guantanamo is a terrorist creating institution and is a direct facilitator in filling out the ranks of Al Qaeda and other terror organizations that would attack the U.S. or our interests. Guantanamo, in military terms, is a recruiting tool of the first order.

Third, to operate Guantanamo, the facility requires the manpower of hundreds of service members. These brave men and women are obliged to carry out policies and procedures that are wholly inconsistent with the American values and ideals that they have sworn to uphold and protect. As a result, the members of our military serving at Guantanamo are forced to bear the burden of our failure to close the facility.

D. Economic power is integral to our national power

American economic power is a final component of national power. Guantanamo is an expense we do not need.

Launching the wars in Iraq and Afghanistan without revenue to pay for them has now required the United States to tighten its fiscal belt. The U.S. economy is improving slowly. The sequester, however, is taking a big bite out of our national security interests.

The comparison between per prisoner cost at the Guantanamo facility and a typical US high security prison is outrageous. Today's calculation, depending on how you work the numbers, gives us a per prisoner cost per year of between \$900K and \$1.6 million. The equivalent cost for an inmate at a high security facility is under \$35K today.¹

Soldiers who see the Defense Department planning to spend up to an additional \$200 million dollars to upgrade a facility that detracts from the individual safety of every American military man and woman shake their collective head. In the austere environment we have today, this is unconscionable. It is time to close a facility that is harming our national security and is in need of an expensive upgrade.

IV. Conclusion

We as a nation are strongest when we uphold the Constitution, the Bill of Rights, the Geneva Conventions, and the other laws, treaties and conventions to which we subscribe. We are weakest when we stray from the rule of law. We have an opportunity and an imperative to close Guantanamo now as we wind down combat operations in Afghanistan.

There is no national security reason to keep Guantanamo open. This is a matter of perspective and understanding of scale. For many years we built up our Russian adversary to be a ten foot tall super opponent, only to discover otherwise. The whole point of terrorism is to instill fear, and maintaining a counterproductive detention facility at Guantanamo because we are afraid to bring criminals the United States for trial and punishment, and transfer to other countries those who have been cleared for transfer, is simply not a reasonable action by a serious society. In the words of one of my colleagues, they don't win unless they change us. We must resist that attempt at change.

¹ See David Alexander, *Guantanamo camp burns through \$900,000 a year per inmate*, Reuters, (May 3, 2013), <http://www.reuters.com/article/2013/05/03/us-usa-guantanamo-costs-idUSBRE94211N20130503>; Press Release, Rep. Adam Smith, *The Cost of Detention at Guantanamo Bay*, (June 5, 2013), <http://adamsmith.house.gov/blog/?postid=336801>.

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Senate Judiciary Committee: Closing Guantánamo: The National Security, Fiscal, and Human Rights Implications

Date: 24 July 2013

**Statement: Stephen N. Xenakis, M.D.
Brigadier General (Retired), U.S. Army**

Thank you for inviting me to share my experience with this subcommittee. It is a privilege, and I hope that my observations and impressions can assist your deliberations over the detention facilities at the Guantánamo Bay Naval Station.

I have publicly opposed torture and the involvement of military medical personnel in interrogations since 2005 when the *Washington Post* published my first opinion piece on the topic. I serve as an expert on torture and the treatment of detainees for Physicians for Human Rights. I am also a member of the group of retired generals and admirals convened by Human Rights First.

Professional Background

I am board certified by the American Board of Psychiatry and Neurology in General Psychiatry, as well as Child and Adolescent Psychiatry, and have extensive experience in clinical psychiatry, research, teaching, and administration. I retired from the United States Army at the rank of brigadier general and served in multiple positions of responsibility as a clinician and commander. I commanded medical activities, medical centers, and medical regions for most of the last 10 years of duty. During my career, I had served as an Assistant Inspector General for The Surgeon General of the Army and as the adjudicating authority for credentialing and privileging actions for numerous providers. My clinical practice has been broad and varied over the past 40 years and includes expert consultation to military attorneys and providing inpatient care, substance abuse and alcohol treatment, and community health services.

The Federal Courts and the Office of the Military Commissions have qualified me as a psychiatric and medical expert in numerous cases involving detainees at Guantánamo Bay Naval Station and accused terrorists. I have had multiple interviews with detainees at Guantánamo, advised attorneys on their respective cases, and spent cumulatively nearly three months at Guantánamo Bay Naval Station over the past 4 ½ years. I currently provide consultation and expert testimony regarding approximately seven current or former detainees. I have reviewed medical, intelligence, and military files of nearly 50 detainees and accused terrorists as a consultant to attorneys, Government authorities, and human rights organizations. The individuals have included high-value detainees, convicted belligerents, and others awaiting release and return to their homes. I have testified in cases of accused belligerents who were captured in the theater of operations and reviewed extensive records of their association with and assisting identified terrorist organizations. Moreover, I have been qualified as a

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psychiatric and medical expert in the Military Courts Martial of a soldier convicted of involuntary manslaughter on the battlefield.

Since the onset of the hunger strike in Guantánamo in February 2013, I provided declarations to the District Court of the District of Columbia in support of the petitions of three detainees. I have evaluated other hunger strikers at Guantánamo including an individual who claims the status of the longest striker since 2006.

Much of my clinical practice and research involves patients with posttraumatic stress disorder (PTSD) and other sequelae of stress and war. These patients are: (1) service members with combat tours in Iraq and Afghanistan, and (2) detainees in Guantánamo and victims of torture, abuse, and cruel treatment. I established a nonprofit clinical research organization, The Center for Translational Medicine, in 2011 for testing promising treatments to help improve the healthcare for service members, veterans, and victims of trauma and abuse.

The treatment of hunger strikers at Guantánamo Bay Naval Station compromises the core ethical values of our medical profession. The American Medical Association has long endorsed the principle that every competent patient has the right to refuse medical intervention. The plain truth is that force-feeding violates that principle, and nothing claimed in the name of defending our country can justify cruel, inhuman, and degrading treatment of another man or woman. The detention facilities at Guantánamo diminish America's standing among our allies around the world by putting at question our true values.

Detainees Currently Suffer from Multiple Mental and Physical Illnesses

Snapshots from my caseload help complete the picture of who these men are and what their states of mind are. My experience, and that of many attorneys and clinicians who work with detainees, adds vital ground-level information in thinking about the conditions and operations at Guantánamo. The view from the front lines is as important as the thinking at the top levels of government. Basically, our experiences serve as "human intelligence" that is often so hard to get. I intend to present my observations and impressions in a way that can be used by leadership in their planning of continued operations and ultimately closing the detention facilities at Guantánamo Bay Naval Station.

Detailed information concerning the individuals I have examined at Guantánamo is restricted by the stipulations of the Protective Order issued by the Department of Defense (DoD) pertaining to the Military Commissions and by the United States District Court for the District of Columbia. Without breaching these orders, I can share some general observations and impressions based on the hundreds of hours I have spent with these men.

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The detainees span a wide range of backgrounds, interests, and experiences. For context, the aging population at Guantánamo is vulnerable to developing debilitating neuropsychiatric disorders secondary to trauma and stress and suffering with dementia, serious depression, and increasing emotional instability. Senior officials at the Department of Defense (DoD) recognize that the detention facilities at Guantánamo are “turning into a nursing home.”¹

My current caseload includes a diverse cohort of detainees with various physical and mental illnesses. One man has suffered with chronic schizophrenia for decades and was certainly psychotic when apprehended and transferred to Guantánamo over 10 years ago. Another detainee has gained hundreds of pounds during his detention. He currently weighs over 450 pounds, 270 pounds more than when captured, and he suffers with multiple medical conditions. Another has been on a hunger strike since 2006. When documented, his weight has been as low as 91 pounds.

No detainee has ever threatened me or acted in a way that I felt physically endangered me. To put it plainly, I do not feel the apprehension or threat to personal safety that often arises when walking into an American prison despite the high fences, sniper wire, and guard towers surrounding the camps in Guantánamo.

None of these men fit the picture of the “worst of the worst.” They do not compare to prisoners I have seen in this country accused of serious felonies or murder. I have annotated in medical examinations, and surmised from reviewing records, that the severe psychological trauma stemming from their experience in U.S. custody has often not been diagnosed nor addressed by the medical staff and authorities and deprived the detainees of needed treatment. My observations and assessments are that keeping many detainees incarcerated at Guantánamo and subjecting hunger strikers to cruel and degrading force-feeding is counterproductive to our national interests and causes further harm.

On instruction from counsel I have also examined the medical records, client affidavits, attorney–client notes, and legal declarations of medical experts relating to nine Guantánamo detainees who had alleged torture during their detention.² Dr. Vincent Iacopino and I published an analysis of the medical records and evaluations of detainees. In these records it was clear that authorities failed to diagnose conditions and illnesses associated with trauma, abuse, and torture, including obvious posttraumatic stress disorder (PTSD) and postconcussion syndrome. Only the exceptional record documents a diagnosis of PTSD in detainees with known histories of torture and abusive and harsh interrogations.³

¹ Confidential and non-attribution.

² Iacopino V, Xenakis SN (2011) Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series. *PLoS Med* 8(4): e1001027.doi:10.1371/journal.pmed.1001027).

³ Furthermore, the government has propagated the theory that time alone can purify the adverse effects of the torture and heal the mental state of the detainee. This assertion

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It is accepted that the symptoms of posttraumatic stress disorder require professional treatment to abate, and there is no evidence that the detainees have received effective treatment for their conditions. Most complain of severe impairment including disrupted sleep, anxiety, poor concentration and thinking, and social isolation.

Statements in the media often leave the impression that all the detainees at Guantánamo are highly trained soldiers, eager to get back on the battlefield. As I have said, I have interviewed over a dozen detainees, reviewed the files of at least 50, and spent a cumulative three months at the Guantánamo Bay Naval Station detention center. In my professional opinion, the vast majority of these men do not fit this picture of the "worst of the worst." In terms of the behavior I have evaluated, many of these detainees pale in comparison to some of the violent prisoners accused of serious felonies or murder that I have seen and evaluated in this country. To be clear, if any detainee has committed a crime, I strongly believe that they should be charged, prosecuted, and if convicted, punished accordingly. The fact is, however, that most of these detainees have not even been charged with a crime. Moreover, the Department of Defense has evaluated many of their cases and cleared 86 for release.

Most Detainees Present Limited Risk of Recidivism

My personal evaluations, interviews, analysis of medical files, and reviews of other records including interrogations indicate that the evidence against the detainees, history of their apprehension, and current condition makes them unlikely threats to national security. Despite that observation, our Government has been unwilling to return them to their respective homelands because of considerations over the instability of the respective countries and potential threat to our military force. This judgment is highly speculative, as their illnesses, length of imprisonment, and cumulative stresses have weakened them and most likely deter them from the "fight."

Many detainees suffer illnesses and consequences of injuries that would disqualify them from recruitment or continuing service in the American military. How dangerous are they to our soldiers and marines, particularly as our forces

ignores the continuous adverse and oppressive climate of the conditions of confinement. An accepted clinical finding of patients with post-traumatic stress disorder is that the effects of the traumatizing events or symptoms can appear at any time in the individual's life and even unpredictably in otherwise innocuous circumstances. The constellation of triggers and associations to trauma vary significantly across individuals and do not correlate discretely to time elapsed or type of trigger. I have observed recurrent symptoms with the disabling nature in most detainees will undergo the court proceedings of the Military Commissions. The government has contended that bringing in a "clean team" that does not perpetrate torture and abuse is sufficient to abate the history of anxiety and fear from prior interrogations and events of confinement.

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have withdrawn from Iraq and are leaving Afghanistan? Does the remote possibility that they may commit a random act of violence classify them as a strategic or military threat that we can effectively justify indefinite detention? Should we subject them to conditions that revive memories of prior torture and abuse and further damage their health? Does the risk of prosecuting or transferring these detainees outweigh the risk of keeping Guantánamo open? I don't believe so. The restrictive and oppressive conditions at Guantánamo undermine our strategic goals of promoting peace and security initiatives where we can.

The government has published data on the recidivism and future dangerousness of detainees who have been released from Guantánamo. This data is anecdotal, uneven, and lacks detail to be reliable. The data do not explain the extremely low rate of recidivism and dangerousness since 2009. The criteria are too general and ambiguous. The data fail the fundamental tests of scientific validity and utility in deciding the dispositions of these men. Moreover, forensic psychiatrists accept that future dangerousness cannot be reliably predicted.

My professional judgment is that the risk of recidivism by current detainees is much lower than the rate of recidivism of those who have committed violent felonies in the American criminal justice system.⁴ Even the Defense Department's flawed recidivism data reflect a lower rate of recidivism than our criminal justice system. There is, however, a very real threat that events at the Guantánamo Bay Naval Station detention facility will continue to undermine our moral authority and international standing.

The story of Adnan Farhan Abd Al Latif Ala'Dini who committed suicide on September 8, 2012, is instructive. I provided a declaration⁵ in support of his petition for writ of habeas corpus in June 2010. The facts as documented in the decision of the Court on August 16, 2010⁶ are that Latif "...suffered a closed head injury following a motor vehicle accident in 1994. The records from the Islamic Hospital, Amman, Jordan, dated August 21, 1994, indicate that a radiologic test revealed 'a broken skull but no brain injury.' The attending physician notes that Petitioner 'was suffering from aches and a headache.' The Medical Committee of the Military Medical Insurance Department of the Ministry of Defense, Republic of Yemen, assigned diagnoses to Petitioner in July 1995 of: (l)oss of sight in the left eye as a result of eye nerve [illegible], and (l)oss of

⁴ <http://www.bjs.gov/content/reentry/recidivism.cfm>
<http://www.bjs.gov/index.cfm?ty=tp&tid=17>
<http://www.bjs.gov/content/pub/pdf/rpr94.pdf>

⁵ Declaration of Stephen N. Xenakis, M.D. Adnan Farhan Abdul Latif v. Barack Obama. District Court of the District of Columbia, June 6, 2010.

⁶ United States District Court, District of Columbia. Mahmoad ABDAH, et al., Petitioners, v. Barack H. OBAMA, et al, Respondents., Civil Action No. 04-1254 (HHK). Aug. 16, 2010.

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hearing in the ears. A consulting neurologist at Guantánamo Naval Base evaluated Petitioner on August 18, 2006. The neurologist documented findings of ...mild deficits in memory and concentration, and upper motor neuron findings involving the left upper extremity that could be residuals of a closed head injury; ... (m)ultiple records of psychiatric interviews and assessments of (Latif) annotate findings consistent with emotional instability and cognitive impairment. Latif reports traveling to Pakistan and Afghanistan in 2001 to get treatment for the symptoms and sequelae of the motor vehicle accident he suffered in 1994."

I opined that ... "(t)he severity of the closed head injury; impairments in cognition, motor functioning, vision, and hearing; and subjective symptoms of headache and emotional instability are all consistent with postconcussion syndrome.⁷ With reasonable medical certainty, (Latif)'s claim that he suffered with significant symptoms and sequelae of his closed head injury in 2001 and was seeking medical treatment is credible." The Court ruled that "(t)he evidence upon which respondents primarily rely, [Redacted] is not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban."

Nonetheless, Latif was not released from Guantánamo after an appeal by the Government. He continued to manifest serious emotional instability and neuropsychiatric symptoms that caused significant management problems for the detention authorities. He went on occasional hunger strikes and splashed the guards with feces and urine. A lengthy investigation of his death, recently released, documents the challenges in treating him and circumstances leading up to his suicide.⁸ The decision to hold a brain injured and emotionally unstable man in Guantánamo defies rationality, particularly in light of the cost of operating the facility and the adverse publicity following his death.

Another detainee who has been on a prolonged hunger strike has developed gastroparesis (paralysis of the stomach), irritable bowel syndrome (IBS), and evidence of chronic malnutrition. His medical condition is precarious, and he manifests symptoms that could eventually lead to his death. He is not receiving optimal medical and psychiatric treatment and requires a comprehensive medical behavioral plan. Because of his status as a chronic hunger striker, he requires a careful and thorough assessment, including many hours of psychiatric interviewing. The medical staff lacks sufficient information to judge his competence or mental capacity, and there is no data to ascertain his cognitive functioning. He has refused to meet with military psychiatrists out of distrust from prior experience with military medical personnel and a history of prior abuse. There has not been an adequate assessment of the intention of his statements

⁷ Diagnostic and Statistical Manual of Mental Disorders (DSM-IV); Neurol Clin. 1992 Nov;10(4):815-47, attached as Attachment D; and J. Trauma 2007 Jan;62(1):80-88, attached as Attachment E.

⁸ AR 15-6 Investigation, Report on the Facts and Circumstances Surrounding the 8 September 2012 Death of Detainee Adnan Farhan Abd Latif, 8 November 2012.

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and beliefs. The conditions of prolonged confinement without reasonable hope of being returned to his home aggravate his illness and contribute to endangering his health. Furthermore, medical staff are subordinated to the guards who maintain the primary relationship with him. This arrangement violates the principles of good medical and psychiatric practice that are essential in the management of complicated cases such as his.

As I mentioned, one detainee now weighs over 450 pounds. He weighed 180 pounds at the time of his capture. He is now morbidly obese and exhibits symptoms consistent with a multitude of medical complications, including diabetes, hypertension, obstructive sleep apnea, cardiovascular disease, and depression. He is at significant increased risk of mortality without treatment, and treatment will be costly. Three former Guantánamo commanders have provided his lawyers with declarations affirming their belief that this detainee does not pose a significant threat to the security of the United States and his continued law of war detention is not necessary. His home country has repeatedly submitted requests to the Department of State and the Department of Defense that he be allowed to return home. Nonetheless, he remains detained, in a severely depressed state, waiting to die in Guantánamo.

I intend for these case vignettes to add vital context to the realities of the environment and climate at the detention facilities. My observations and impressions shift the strategic view of Guantánamo from the overriding mission of security operations to rehabilitation and transition of individuals who should return to their homeland. We should assist them to establish constructive lives in their communities.

Seasoned military leaders appreciate that effective and strong command requires good policies at the top and accurate data from the front lines. These stories elicited from detainees and observations by outside lawyers and physicians complete the picture of who these people are and what their lives are like. They add to the facts that we need to achieve our strategic goals and military mission.

The Hunger Strike and the Consequences of Abuse and Torture

The current hunger strike at Guantánamo dates to February. Since that time, the authorities have classified almost 100 detainees as hunger strikers. The authorities relocated the hunger strikers from the communal cellblocks to individual cells in March. According to Standard Operating Procedures (SOP) at Guantánamo, detainees who missed 9 consecutive meals were subjected to forcible feeding by nasogastric tubes starting in February. By June, at least 45 detainees were being force-fed. The authorities conducted multiple forced cell extractions (FCE) and reinstated intrusive search procedures causing further distress and aggravation. Since Ramadan, some detainees have returned to the communal cellblocks and are not officially classified as hunger strikers.

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The genesis of this recent hunger strike has multiple sources. At the core, however, is a general feeling of desperation and hopelessness the detainees endure as a result of their indefinite detention. Even those who have never been charged and have been cleared for release by the Department of Defense have lost all hope of ever being released from Guantanamo.

Attorneys and journalists covering the hunger strikes trace its genesis to Latif's suicide, which is documented in an AR 15-6 investigation conducted by the military. The detainees express deep aggravation at JTF-GTMO reinstituting search procedures from 2006 that followed Latif's suicide and investigation. The detainees feel offended by procedures reinstituted by the guard staff that includes frisking groin areas, rifling through Korans, and invading the privacy of living areas. They feel appalled at being treated like convicted criminals, even though many had been cleared for release and had never been charged or convicted of crimes that justified imprisonment.

The claims of attorneys and journalists regarding the basis for the hunger strike and profound despair of the detainees are justified. The recent testimony of the Commander of United States Southern Command affirms that policies and procedures changed in response to Latif's suicide. The Joint Detention Group Commander decided that he had to reinstate procedures for guards to search through Korans for contraband and manually frisk the groin area of detainees before visits outside a housing camp or meeting with non-JTF-GTMO personnel. The guard staff decided to return to single cell operations and disrupt the communal living arrangement of most of the detainees.

The conditions of confinement revive memories of harsh interrogations and abusive treatment and constitute a credible threat of a return to abusive treatment. This environment is coercive and perpetuates the harsh and abusive treatment experienced by most detainees when apprehended. My assessment of the environment and conditions was expressed in the declaration that I submitted in February 2010 to Judge Thomas F. Hogan of the District Court of the District of Columbia:

The threats and use of coercion by Petitioner's interrogators were constant during the relevant time period. As detailed in Petitioner's classified testimony about the conditions of confinement, which the Court finds to be credible, United States forces were involved in both Afghanistan prisons where he was held. He believed the United States government orchestrated the harsh interrogation techniques to which he was subject. It thus should come as no surprise that during Petitioner's first Guantánamo interrogation, which was conducted by a United States official on the day Petitioner arrived at Guantánamo, he was gripped by the same fear that infected his Afghanistan confessions. His Guantánamo interrogators did little to assuage that fear. According to the reliable evidence in the record, multiple Guantánamo interrogators on multiple

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occasions threatened Petitioner when he attempted to retract statements that he now claims were false confessions. Therefore, from Petitioner's perspective, his interrogators and custodians did not change in any material way during the period in question.

The high number of forced cell extractions (FCEs) during the current hunger strike reinforces fears and impressions that conditions at Guantánamo will not change and that detainees cannot reasonably expect to be released. The detainees regard the environment and command climate at the camps as disrupting any constructive dialogue and possibility of a decent and humane relationship with the authorities.

Over the years, I have conducted innumerable reviews of suicides and homicides looking for evidence of shortfalls and errors in clinical care. My review of Latif's AR 15-6 identifies many other factors and lapses in procedures that provide more compelling causes for his death than the failure to search his groin area or rifling through his Koran. The AR 15-6 investigation documented Latif's unequivocal statement that he intended to commit suicide, if returned to the single cell where he died. He had a history of traumatic brain injury and emotional instability that placed him at high risk for self-harm and suicide. My opinion, as a clinician and experienced reviewer, is that his suicide should be attributed to gaps in clinical care and routine procedures for closely monitoring an individual at high risk for harming himself or others. The change in procedures for searching detainees and transferring them from communal living deflects reasonable efforts to get to the bottom of the problem in safeguarding the detainees and protecting the guard force. Furthermore, there is no mention of a reported incident that preceded the hunger strike: a guard wounding a detainee in the neck with a rubber bullet while he and others were congregating in the communal area. The detainees attribute their embarking on the hunger strike to the cumulative stress of the search procedures, violations of the Koran, invasion of privacy, and assault.

The changes in procedures reportedly so offended the detainees that they felt they could only express their deep dissatisfaction by engaging in a hunger strike. Relocating the detainees to the individual cells from the communal blocks reenacts the trauma of the isolation and sensory deprivation experienced with cruel and abusive interrogation. The forced cell extractions, forcible feeding, and isolation in single cells significantly aggravates their neuropsychiatric symptoms and medical illnesses.

Force-feeding of Detainees

The policy by the authorities at JTF-GTMO to force-feed detainees by nasogastric tube (NGT) illustrates the gaps in understanding the mentality of the detainees, appreciating the stresses imposed on them, and the prerequisites for maintaining a constructive working relationship between guards and detainees. Furthermore, force-feeding completely undermines the physician-patient relationship by destroying the trust that is essential for all clinical treatment,

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including medical issues unrelated to force-feeding. It inappropriately engages physicians in the use of force against detainees.

The World Medical Association (WMA) has published two ethics declarations describing the duties of physicians with regard to prisoners on hunger strikes. They are the Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment ("Declaration of Tokyo") and the Declaration of Malta on Hunger Strikers ("Declaration of Malta"). The Declaration of Tokyo, dating from 1975, states that

Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner.

The use of the word "artificially" was somewhat imprecise, but has been interpreted by many organizations, including the American Medical Association, to prohibit force-feeding.⁹

The Declaration of Malta, originally adopted in 1991 and substantially revised in 2006 establishes both ethical standards and appropriate clinical responses to hunger strikes. It lays out a humane and clinically effective response to hunger strikes and establishes that force-feeding is unacceptable. It illustrates the false choice between saving lives and force-feeding.

The physician's role includes evaluating the detainee's medical and psychological condition, discussing consequences of fasting and options for taking some nutrients, monitoring the detainee's caloric intake, blood pressure, weight-loss, and other medical consequences of fasting. The physician advises, counsels, listens, and assists the prisoner in clarifying goals, desires, and decisions. To perform this role, there must be a true doctor-patient relationship based on trust. As the Declaration of Malta states:

Fostering trust between physicians and hunger strikers is often the key to achieving a resolution that both respects the rights of the hunger strikers and minimizes harm to them. Gaining trust can create opportunities to resolve difficult situations. Trust is dependent upon physicians providing accurate advice and being frank with hunger strikers about the limitations of what they can and cannot do, including where they cannot guarantee confidentiality.

To establish trust, the physician must be clinically independent of the authorities. The Declaration of Malta states that doctors should "not allow third parties to

⁹ Lazarus, Jeremy A. Letter to Secretary of Defense Chuck Hagel, April 25, 2013.

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influence their clinical medical judgment" nor "allow themselves to be pressured to breach ethical principles, such as intervening medically for non-clinical reasons." If they cannot fulfil this role, or a detainee does not trust the physician, a physician who can establish independence and trust must be brought in.

The first step in medical evaluation is determining mental capacity. The "assumption of capacity" is the overriding principle of capacity assessment. This states that a person is deemed to have capacity unless it is proved that they have an impairment or disturbance of mental functioning (such as an intellectual disability, dementia, other cognitive impairment, acquired brain injury or mental illness) and this impairment is sufficient to affect their capacity to make a particular decision, in this case food refusal.

Assessment involves two stages: (1) an assessment of mental impairment and (2) a mental capacity assessment.

In particularly complex cases (and the current hunger strike in Guantánamo falls into this category), a physician should call on a psychiatrist to provide an objective opinion. That opinion should be minimally influenced, as possible, by the environmental, political, and administrative issues affecting the mental state of the hunger strikers. Such an evaluation should also exclude other bases for food refusal such as mental illness (e.g. schizophrenia, suicidal depression, or anorexia). Hunger strikes rarely demonstrate suicidal intention. Rather, the prevailing opinion of experts in this field is that hunger strikes are undertaken by persons who do not wish to die, but are prepared to risk death in the hope that their demands are met. Case by case evaluation, however, remains critical. The procedure, information gathered during a capacity assessment, and the basis for the decision should all be carefully documented.

If the conclusion is that mental illness is causally linked to the food refusal, the physician may be obliged to override the patient's decision. On the other hand, it may be determined that an individual suffers from a particular mental impairment but nevertheless retains mental capacity to make decisions regarding his or her own treatment. The WMA guidelines (attached) address such complex situations. *"If a physician is unable for reasons of conscience to abide by a hunger striker's refusal of treatment or artificial feeding, the physician should make this clear at the outset and refer the hunger striker to another physician who is willing to abide by the hunger striker's refusal."*

A lack of capacity cannot be assumed on the basis of cultural or religious beliefs, age, appearance or conditions of confinement.

It is noteworthy that the March 2013 Standard Operating Procedures at Guantánamo (released by the media) do not stipulate acting on capacity assessments. Instead the protocol says that a behavioral health unit will assess mental and psychological status, but does not say what is done with that information. We can infer that the absence stems from a policy of force-feeding all detainees who refuse food. That policy undermines good clinical practice as well as disrespecting the choices of competent detainees.

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The Guantánamo hunger strike protocols make no provision for effective counseling beyond initial advice on the consequences of refusing nutrition. There are no procedures for advance directives. Effective medical counseling involves not only providing information on the medical consequences of fasting, but helping the detainee understand his options, including taking some nutrients; helping with decision-making in the event that medical complications occur after fasting, including setting out advance directives for treating life-threatening conditions.

The guidelines for hunger strikes at JTF-GTMO authorize forcible feeding after a detainee has missed 9 meals, long before a hunger strike becomes life threatening. The assertion of the Department of Defense is that it must force-feed to save lives, but these guidelines derail appropriate clinical evaluations and counseling and are not necessary to save lives. They set up a contest of wills between detainees and prison authorities.

The Declaration of Malta demands respect for the hunger striker's decisions. It explicitly addresses principles of medical beneficence and respect for patient autonomy. It explains that the obligation of beneficence "includes respecting individuals' wishes as well as promoting their welfare" and does not justify "prolonging life at all costs, irrespective of other values." The physician's obligation to avoid harm "means not only minimizing damage to health but also to not forcing treatment upon competent people nor coercing them to stop fasting." In other words, should the conclusion of the assessment be that the patient has the mental capacity to refuse food, the physician is bound by medical ethics and international and U.S. law to refrain from enteral feeding

Thus, the Declaration of Malta states that "[f]orcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting."

In short, the World Medical Association has determined that force-feeding through the use of restraints is not only an ethical violation but contravenes Common Article 3 of the Geneva Conventions. The International Committee of the Red Cross has taken the same position.

The American Medical Association (AMA) has been a member of the WMA since its inception after World War II. In 2005, 2009, and most recently on 25 April 2013, through Dr. Jeremy Lazarus, then President of the AMA, the AMA reiterated its opposition to force-feeding at Guantánamo. He wrote to Secretary of Defense Chuck Hagel detailing the AMA's position on force-feeding. "Every competent patient has the right to refuse medical intervention, including life-sustaining interventions." The AMA position means that when a physician performs, orders, supervises or monitors enteral feeding on a person who has

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refused such treatment, and has the mental capacity to refuse, this constitutes a violation of medical professional ethics.

Every aspect of Guantánamo's policy of force-feeding contravenes these standards. Physicians are not independent, and are instructed to follow a protocol for enteral feeding that overrides medical professionalism. They do not counsel detainees about their options, much less help them prepare advance directives. According to the protocol, they participate in the coercive process, including being expected to order physical restraints for force-feeding. Nurses similarly are ethically compromised. Nurses are not allowed to act on a detainee's request to see a doctor or to change the content of the food used or the rate of flow -- only to make a note in a chart.

Indeed, there is an inherent conflict of interest in having the Senior Medical Officer (SMO) and/or primary medical provider serve as the decision maker with regard to nutritional and tube feeding choices for the hunger strikers. Any trust that the provider has established with the patient is at risk, and any desirable influence that the provider may have over the patient's decision making may be lost. Additionally, consulting physicians, both military and private, have observed that this responsibility has proven acutely stressful for the individuals filling the SMO position, likely as a result of the interference with a sound relationship with the patient.

The infringement on medical and nursing professionalism at Guantánamo is deliberate. The new Standard Operating Protocol states that responding to hunger strikes "requires a partnership between the [Joint Medical Group] medical staff and the Joint Detention Group (JDG) security force." That is an inappropriate role for physicians and nurses: they are expected to be independent and serve patients, not security forces.

Further, the process of force-feeding at Guantánamo is painful, degrading and inhumane. My experience as a physician is that the process is intolerable for many. The humiliating nature goes beyond the nasogastric tubes and restraints.

Reliable reporting indicates that the authorities conduct multiple Forced Cell Extractions that traumatize and potentially injure detainees. The forcible feeding at Guantánamo appears designed to end the protests and not to save lives. The Department of Defense's March 2013 protocol on force-feeding analogized changes in responding to hunger strikers to adjustments made in battlefield tactics. The changes include rescission of policies allowing detainees to choose the rate of flow of nutrients and taste of food and denying communal activities to hunger strikers.

It appears that, during the past week to 10 days, some hunger strikers have abandoned their hunger strikes. This may prove that the punitive, cruel, and inhumane politics are working -- but that hardly makes the policies and procedures legitimate, ethical, effective, or legal.

BG (Ret) Stephen N. Xenakis, M.D.

Experiences In Other Countries

Two major allies, the United Kingdom and Israel, address hunger strikes alleged to be associated with terrorism, and both prohibit force-feeding. The UK prohibits forcible feeding by law. It is instructive that Israel has written the sanctity of life into law, but it has not forcibly fed thousands of Palestinian prisoners on hunger strikes. A court case in 1996 permitted force-feeding, but the Israeli Medical Association demands adherence to the Declaration of Malta and uses ethics committees to aid physicians attending to hunger strikers. If detainees do not trust prison physicians, outside physicians are called. Although the response of Israeli prison authorities to hunger strikes could be improved, they have not engaged in force-feeding and, to my knowledge, no prisoners have died since procedures under the Declaration of Malta were adopted.

Leadership

A complex operation such as Guantánamo requires experienced and steady leadership. An axiom of good military leadership is that the command at the top sets the climate and is responsible for "what is done and not done." Recent testimony by senior leaders at hearings before the Military Commissions convey details of policies and procedures that have an adverse effect on the overall operation of the facility and contribute to obvious problems.

Standard policies for assigning senior leaders and personnel stipulate tour lengths of a year or less.

Few senior leaders have backgrounds in operating complex detention facilities. These leaders enact policies and procedures that further harm the detainees and perpetuate a climate of abuse and maltreatment. Over the past 10 years, the senior commander has been a rear admiral— in the combat arms or combat support - with experience commanding fighting units. The commanders are assigned to JTF-GTMO for a year and rely on "learning on the job." The testimony of a former Commander of JTF-Guantánamo at the recent Military Commissions reflects the facility's overwhelming emphasis on safety, security, and intelligence gathering and analysis. Basic ethical and legal standards for the attorney-client relationship, rehabilitation of detainees, and medical treatment are subordinated in favor of policies for maintaining order and discipline. As the hunger strike indicates, current policies and procedures further abuse detainees and undermine even faint attempts to prepare them for transition to their homes and rehabilitation.

Furthermore, the testimony of the current Joint Group Detention Commander at the Military Commissions hearings revealed that he "...had never run a prison." When asked if he had ever run a detention facility housing people awaiting the death penalty, he again answered "(n)o." He had only operated detention facilities housing American prisoners, and indicated no experience with Muslim

BG (Ret) Stephen N. Xenakis, M.D.

detainees or men of other ethnic backgrounds. This commander is responsible for the changes in policies and procedures following Latif's suicide and preceding the current hunger strike. I am not impugning his professionalism or competence as an Army officer, but questioning the wisdom of DoD in assigning a comparatively inexperienced officer to run the 'most notorious prison on the planet.'

The circumstances surrounding the suicide by Adnan Latif and subsequent hunger strike illustrate the problems with effective leadership at Guantánamo. The leadership failed to assign staff experienced with individuals at risk for self-harm and suffering with serious emotional disturbances. The medical and psychiatric issues were subordinated to policies for maintaining good order and discipline. Primary responsibility for management rests with the guard staff and not the medical staff. These policies and procedures deprive medical and psychiatric personnel from standard and appropriate options for managing individuals with serious medical and psychiatric illnesses and providing optimal treatment for their conditions.

Recommendations

Force-feeding at Guantánamo must end. It is unethical, an affront to human dignity, and a form of cruel, inhuman, and degrading treatment in violation of our Geneva Convention obligations. It simulates the conditions of torture and abuse that many detainees had already suffered. Further, the claim that force-feeding at Guantánamo is essential to save lives is false and not corroborated by clinical experience. The experience with hundreds of hunger strikers in other countries over the past decades shows that engaging early in an appropriate doctor – patient relationship obviates the decision to forcibly feed to save life. The procedures outlined by the World Medical Association, and endorsed by the American Medical Association, are effective, ethical, and life-saving.

The decision to end force-feeding is an important starting point to reforming policy, guarding against coercion of detainees, and ending indefinite detention.

My recommendations include:

First, the underlying issues that contributed to the hunger strike must be addressed. These include expeditious release from Guantánamo of those detainees already cleared for release to ending the harsh conditions of confinement that have been put into place this year.

Second, detainees should not be punished for engaging in hunger strikes. Placing hunger strikers in isolation or in "dry cells," subjecting them to violence in transferring them from place to place, denying them access to communal areas or other detainees, and all other coercive measures should end and be prohibited in the future.

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Third, all directives, orders and protocols that provide, explicitly or implicitly, that health professionals act as adjuncts of security officials must be rescinded. There is no such thing as an effective partnership between security officials and medical care providers in addressing the medical needs of detainees. Doctors and nurses need to act as treating clinicians, with professional independence and in accordance with ethical obligations of doing no harm and meeting individual needs. There are difficult challenges in providing health care services in any prison, but adherence to professional ethics should not be one of them. Further, mechanisms need to be put into place to reinforce professional independence and provide for support of doctors and nurses who find their independence or other ethical responsibilities tested. This includes leadership at the highest levels of the military in affirming these values.

Fourth, the aging detainees require more complicated and sophisticated medical care. Chronic hunger strikers often become medically compromised, nutritionally depleted, and suffer from physiological and psychological harms that impose special challenges on clinicians. In general, the detainees do not trust physicians and nurses who have been part of the force-feeding apparatus. The regular rotation of clinical staff impedes continuity of care, diagnosis, and treatment. It places dedicated and professional military clinicians in untenable circumstances of providing suboptimal treatment to an increasingly ill population. It is not fair to the doctors, nurses, or detainees. If the closure of the detention facility is not achievable, then independent medical evaluations, followed by appropriate treatment and counseling, are invaluable.

In taking these steps, the Department of Defense has many resources to aid in formulating and implementing new policies. I am confident that medical associations, both in the United States and in countries such as the United Kingdom or Israel, would be willing to lend expertise. The International Committee of the Red Cross (ICRC) has extensive experience in advising prison authorities in responding to hunger strikes. Physicians like me who have had experience with detainees at Guantánamo would, I am quite sure, be willing to contribute their expertise and insights.

Thank you, again, for the privilege of speaking to you.

**Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications
Testimony Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights,
and Human Rights**

July 24th, 2013

Statement for the Record Submitted by

Josh Fryday

Lieutenant, United States Navy

Chairman Durbin, Ranking Member Cruz, members of the subcommittee, thank you for inviting me to testify today. I appreciate your commitment to moving forward on this difficult issue.

The following statement is based on my own personal experience and knowledge, and does not reflect the views of the Military Commissions Office of the Chief Defense Counsel, United States Navy or Department of Defense.

My name is LT Josh Fryday. I am a graduate of UC Berkeley School of Law, and member of the California State Bar. I am qualified and certified to practice before courts-martial pursuant to Article 27(B) of the Uniform Code of Military Justice, and an attorney at the Military Commissions Office of the Chief Defense Counsel. I am also a Term Member on the Council on Foreign Relations.

I am grateful for the invitation to share my experiences.

Over the past year I have been assigned under military orders to serve as military defense counsel for individuals detained in Guantanamo Bay, Cuba. There are 166 men remaining. I represent one of them.

I'm not here to ask for sympathy for the man I have been ordered to represent, justify his actions or argue his guilt or innocence. But I would like to tell you a little about him. He is an Afghan citizen with a 3rd grade education he received in a Pakistani refugee camp, after his family fled the Russian invasion. He has never been alleged to harm anyone—Afghan or American. He was roughly twenty-two years old when detained—although he isn't sure of his exact age. He has a son, Imran, who was 6 months old when he last saw him.

In 2008 he was charged with Material Support for Terrorism. In 2009, the Military Commission process halted, and his charges were dismissed. For several years he lingered, waiting for charges. But, in 2012, the D.C. Circuit Court of Appeals essentially eliminated his chances of being brought before a Military Commission. In *Hamdan v. U.S.*, the court vacated

the conviction of Hamdan, Osama Bin Laden's driver, and ruled that because Material Support for Terrorism is not an established violation of the international laws of war, it could not be applied to those whose alleged acts took place before Congress passed the Military Commissions Act in 2006. My client's alleged material support for terrorism happened in 2003.

As long as the D.C. Circuit's decision stands, there is no charge the government can bring against my client in a Military Commission.

Had my client been brought to federal court, instead of GTMO, he could have, and would have, been tried years ago. Ten years later, with no actual crime with which he can be charged, he sits in Guantanamo.

His only other option of challenging detention through habeas has effectively been cut off by the D.C. Circuit Court. The court has set the standard for evidence needed to justify continued detention so low, to include hearsay, that no detainee has been granted habeas in recent years. Thus, he remains imprisoned indefinitely.

I do not intend to argue here that my client has never made any mistakes in his life. But if he is guilty of any crime, he should be charged and given his day in court.

People often ask me if it is difficult representing a detainee in Guantanamo. I'm proud to live in a country where I can be ordered by my Commander-in-Chief to perform such a challenging mission. My colleagues, prosecutors and defense lawyers alike, are patriots who love their country. In the military, we are taught to perform our duties with honor, courage and commitment.

The tougher questions come from my client. He asked me how it is possible for my government to detain him for over ten years without proving he committed a crime, or even hurt anyone? I try my best to explain that some in our government believe under the laws of war, we are allowed to detain people indefinitely until the war is over. He then asks me, "You will no longer be at war with Afghanistan after 2014. Can I go home then? Or does this war never end?"

My client was heartened when he heard that President Karzai demanded the return of all remaining Afghan citizens still left in Guantanamo. The Afghan government now controls the Parwan, formerly Bagram, detention facility. They are now responsible for detaining Afghan citizens.

As a service member and an attorney sworn to uphold the constitution and our strong legal traditions, I don't have good answers to my client's questions.

Many of the legal rules and elements of due process we have set and worked to improve over the last two hundred plus years are largely absent from Guantanamo.

Basic elements that define our notions of justice—access to counsel, meaningful habeas review, continued independent review of evidence, and a reliable court system designed to ensure swift and fair proceedings—are not available to my client.

Access to counsel

We have a long tradition of respecting a defendant's right to counsel. Basic to that right is the ability of a defendant to have access to his attorney. In GTMO, access to counsel, even for those with attorneys, is a constant struggle.

The logistics of traveling to Guantanamo to meet my client are costly, and burdensome. Flights to Guantanamo are irregular and so uncommon that each visit requires a four to five day stay on the island. Due to budget constraints, the Office of Military Commissions has recently cut half of the flights scheduled to go to Guantanamo that are used for defense attorneys to visit our clients. Once there, procedures instituted by the detention facility create extra hindrances on our defense attorney meetings with clients.

Recently, one defense attorney representing a detainee with active charges at a Military Commission was prohibited from bringing his spiral notebook into a meeting with his client. The notebook contained attorney-work product for the Commissions case and had been brought previously and regularly into attorney-client meetings since 2008 by this same attorney at this same location. However, without notice or warning, one day in April 2013, the notebook was now labeled a prohibited item.

Detainees are also discouraged from meeting with their attorneys. After the most recent hunger strikes were widely publicized, new procedures were put in place every time a detainee moved from his housing camp to the attorney meeting rooms. My client refused visits from me during my last trip because of newly required invasive genital searches, and new transportation vehicles forcing him to sit in very uncomfortable positions – similar to stress positions - for long periods of time. The chief judge of the D.C. District Court recently addressed this issue for civilian habeas attorneys who were having the same experience with their clients. The judge concluded, "...the search procedures discourage meetings with counsel and so stand in stark contrast to the President's insistence on judicial review for every detainee." (*In Re Guantanamo Bay Detainee Litigation - Hatim, et al v. Obama*, D.D.C. 11 July 2013)

When meetings do occur, there is no confidence that the attorney-client conversations are private or privileged. That trust was shattered when it was discovered a few months ago that attorney meeting rooms had secret audio and video recording devices in them, disguised as smoke-detectors, and the audio and video feed of commission trials were being controlled by government agencies, unbeknownst to even the judge. If I do make it into a meeting with my client at Guantanamo, I have reason to believe that someone within the U.S. Government could be listening in on my conversation with my client.

Periodic Review Boards

In Executive Order 13567, the Commander-in-Chief ordered the establishment of Periodic Review Boards. The purpose of the review was supposed to be to determine whether or not each detainee continued to constitute a “significant threat to the security of the United States.” An initial review for each detainee was ordered to be completed no later than one year later, March 7, 2012. As of today, two years and four months after the Executive Order, not a single review board has been held.

When they do start, and we are told they will begin soon, no one knows what they will actually look like, and how they will be structured. Serious questions remain as to whether they will be conducted with any assurances to the American people that they will accomplish what they are supposed to do—determine who in fact truly still poses a threat to our country. If they are not conducted properly, and exist merely to rubber stamp the continued detention of those in Guantanamo, they will fail to achieve their goal, and continue to erode confidence in the processes at place in Guantanamo.

Military Commissions

Lastly, when it comes to the military trials actually being conducted at Guantanamo, for six out of the one hundred and sixty-six detainees, the experiment of Guantanamo continues. Rather than relying on our Federal criminal justice system, which has exhaustively litigated, and exhaustively re-litigated trial issues for over two-hundred years, we continue to re-invent the wheel in a remote location.

Our federal system has successfully prosecuted nearly 500 terrorists since 9/11. The nearly five hundred terrorist convictions were the result of trials in sixty different US district courts; forty-four cases were in the Southern District of New York alone. (<http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Courts.pdf>). The Federal Government successfully convicted Zacarias Moussaoui, the twentieth 9/11 hijacker, who is currently serving a life sentence at a Federal Supermax prison in Colorado.

In contrast, after being revamped three times, the Military Commissions in Guantanamo have only convicted six people since 9/11. Two of these convictions have already been vacated, casting further doubt as to Military Commissions’ ability to withstand appellate review.

The Military Commissions continue to be wrought with debilitating challenges for both the prosecution and defense that often bring substantive hearings to a halt. The overbroad classification rules and the absence of a classification guide prevent both the prosecution and defense from fulfilling their respective obligations to discover evidence and investigate the allegations against detainees. Recently, both sides were forced to litigate the discovery of hidden microphones in attorney-client meeting rooms placed there by law enforcement and intelligence agencies that work independently of the prosecution. Defense attorneys are further restricted

from effectively communicating with their clients by unreasonable searches of attorney-client mail, an issue that resulted in almost two weeks of hearings.

Conclusion

We are a nation of laws and high moral standards. We are a people of principle who believe in due process and innocence until proven guilty. Denying my client a trial and detaining him indefinitely is at odds with our values.

It is also at odds with our history.

On the eve of the Revolutionary War, we held trials for British soldiers responsible for the Boston Massacre. Before we were even a nation, our founding father John Adams extolled the virtues of a people governed by the Rule-of-Law when he served as one of the British soldiers' defense lawyers. He set the example for the type of justice this new country would stand for.

Some in Guantanamo are responsible for unforgiveable acts of evil. Our history teaches and our values demand that, they too should be tried, and if found guilty, punished for their crimes.

Today, six detainees are being tried in Military Commissions for the atrocities of 9/11 and USS COLE bombing. These trials have been marked by arguments over what clothes can be worn in court, how attorney-client mail should be read, and how lawyers may be permitted to take notes in meetings. Almost twelve years after our nation was attacked, we are still years away from completing these trials and securing justice.

This delay in justice is not because we provide too many rights for our enemies. Quite the opposite—it is because for too long we tried to abandon our basic principles of justice and existing courts of law, on an island prison we created.

Everyone here knows our threats are real. They must be taken seriously and pursued with the utmost intensity and vigilance. Criminals and terrorists should be prosecuted and jailed. Our enemies must be clear about our steadfast and dogged commitment to bring them to justice, and they must know we will not stop until we do.

At the same time, the law and our values require that we put these men on trial and prove they are guilty. We believe in due process – a fair trial, the opportunity to confront your accusers, and a chance to be presented with the evidence against you.

For centuries, American service members have fought and paid the ultimate sacrifice to protect these fundamental values that define our country. We should endeavor to always be faithful to those values, especially when it is most challenging to do so.

Submitted Testimony of
FRANK J. GAFFNEY, JR.
President, Center for Security Policy
Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights
and Human Rights

On the Need to Continue Operation of the
Unlawful Enemy Combatant Incarceration Facility
at Guantanamo Bay, Cuba

24 July 2013

Chairman Durbin, Ranking Member Cruz, members of the Subcommittee, thank you for affording me an opportunity to testify today on the implications of closing the detention/interrogation facility at Guantanamo Bay.

As a former member of the staff of a great Democratic Senator, Henry “Scoop” Jackson, and as a professional staff member for the Senate Armed Services Committee under Republican Chairman John Tower, I have great affection for this institution. I revere the mandate it received from the founders as a co-equal partner with the executive in governing this nation.

In my subsequent four-and-a-half years in the Reagan Defense Department – in which, among other capacities, I acted as the Assistant Secretary of Defense for International Security Policy, I had a different perspective on the accountability the Congress could exact from the executive branch. But I welcomed then, and encourage now, the legislature’s indispensable oversight role – a role that is, in my view, essential to maintaining a “well-ordered liberty.”

The Case for Gitmo

Let me begin my argument for retaining the detention and interrogation facility at Guantanamo Bay, Cuba (nicknamed “Gitmo”) by noting a fundamental reality: **Our nation is at war.** We are operating in that status pursuant to Congress’s 2001 Authorization for the Use of Military Force (AUMF), and in accordance with the laws of armed conflict governing a nation’s right to self-defense. These are the legal mechanisms of which we have availed ourselves to enable and guide the use of force necessary to protect the United States.

We have been obliged to go to war because it was thrust upon us. And, if we are to prevail in this conflict, we must understand the nature of the enemies with whom we are at war. They are *shariah*-adherent jihadists who believe, in accordance with that doctrine, that it is God's will that they destroy our way of life and subjugate us to theirs.

It is important to state at this point that not all Muslims subscribe to *shariah*, or seek to impose it on the rest of us. Those that do not adhere to this ideology are not necessarily a problem. They could even be critical to mitigating the threat posed by their co-religionists who *do* embrace *shariah*. But it is a grievous mistake to think that those we confront are not animated by what they believe to be a spiritual mandate, that we confront only threats from al Qaeda, or that its members are appreciably distinct from others who pursue *shariah*'s requirements to achieve its supremacy worldwide under the rule of a caliphate.

Our *shariah* supremacist enemies have made their intentions known to us prior to the devastating attacks on 9/11, and they have made no secret of them since. The belief that their holy war is divinely inspired has contributed not only to the violent and stealthy forms of jihad being waged against us. It has also contributed materially to the determination of a significant percentage of those captured on the battlefield and detained at Guantanamo Bay to return to the fight if and when they are released.

It would be the subject for another, most useful hearing if this Committee were to examine the lengths to which we have gone as a nation to ignore these realities. Suffice it to say for the present purpose that, by failing to understand the nature and abiding ambition of our foes, we are prone to making dangerous tactical decisions, such as releasing hardened detainees, and potentially fatal strategic ones, including contemplating the closure of Gitmo.

Let's be clear: **Guantanamo Bay is the optimal location for U.S. detention and interrogation of unlawful enemy combatants.** It is simultaneously a uniquely secure facility and a highly humane one. And Gitmo has these attributes primarily thanks to the servicemen and women whose professionalism, discipline and courage make them possible notwithstanding routine, vile and often violent provocations on the part of detainees.

The Absence of Sound Alternatives

The burden of proof should be on opponents of Gitmo to define a superior arrangement. To date, they have been unable to persuade the Congress that there is such an alternative. Indeed, the other choices pose grave risks for national security and/or are less humane than incarceration at Guantanamo Bay. Let me briefly examine several of these in turn.

First, handing detainees over to third-party nations can result in the prisoners deliberately being set free, breaking out of jail or otherwise being enabled to re-join fellow jihadists on the battlefield. In 2010, the Obama administration suspended the transfer of detainees to Yemen out of concern that, according to the *Washington Post*, "a deteriorating security situation

driven by a branch of al-Qaeda has stoked fears that detainees could join – or rejoin – the terrorist organization if released.” (http://articles.washingtonpost.com/2010-01-05/world/36778253_1_yemeni-detainees-guantanamo-bay-guantanamo-prison)

Just yesterday, the Iraqi arm of al Qaeda claimed responsibility for raids on prison facilities near Baghdad that released hundreds of inmates, including members of al Qaeda. This incident shows the folly of relying on vulnerable foreign prisons to keep dangerous individuals incarcerated.

The risk of former Guantanamo Bay detainees returning to the battlefield is a significant one. Last year, the Office of the Director of National Intelligence released a report indicating that, of the 599 released former Gitmo detainees, 27.9% were either confirmed or suspected of engaging in terrorist activity. This amounts to a 2.9% increase in former Guantanamo detainee recidivism as reported by the ODNI in December, 2010 (<http://www.reuters.com/article/2012/03/06/us-usa-guantanamo-recidivism-idUSTRE82501120120306>). My guess is that some number of the remaining group is *also* back in the jihad, even if there is no evidence of it thus far.

Second, transferring the Guantanamo detainees to the United States for detention – in say a prison like that formerly known as the Thomson Correctional Facility in Illinois – poses substantial security risks. For one thing, there is the danger arising from what the jihadi detainees might do inside a U.S. prison population in terms of violent plots or perhaps simply their toxic form of shariah proselytization.

For another, housing prominent jihadists in a given American community could cause it to be targeted by their comrades, either in the hope of actually freeing the detainees or simply as an act of jihad. Former federal prosecutor Andrew C. McCarthy, who secured the conviction of the “Blind Sheikh” for his role in the first bombing of the World Trade Center in 1993, has previously pointed out that jihadists target military bases, and U.S. military bases consist of entire communities where members of our Armed Forces live with their families.

Once detainees are physically inside the United States, moreover, they are within the jurisdiction of federal judges, before whom defense attorneys will argue their clients deserve the full array of constitutional rights afforded to common criminals. Undoubtedly, some federal judges will agree with this assertion.

That would, in turn, enable detainees to be tried in this country under criminal law standards that cannot, as a practical matter, be applied to the circumstances of wartime capture (e.g., evidentiary procedures, Miranda rights, etc.) Prosecutors could then be put in the position of having to disclose classified information in order to secure a conviction under these standards, or risk having the detainee be released – perhaps *inside the United States*, especially if no other country is willing to take him.

Let’s not kid ourselves. Even if such risks were non-existent, or simply deemed acceptable, there is no reason to believe that holding Gitmo detainees would spare us the criticism of human

rights advocates and defense lawyers of the “Gitmo bar”—including appointees in the Obama administration. As Andy McCarthy has also noted, some of these folks have previously asserted that Supermax-stype confinement is a human rights violation. In point of fact, “shoe-bomber” Richard Reid, who was held in a Supermax facility under “special administrative measures” (SAMs) to ensure his secure confinement, argued that the SAMs violated his constitutional rights. The SAMs were subsequently lifted. (Mr. McCarthy’s full treatment of this subject can be found here: <http://www.nationalreview.com/articles/229203/going-senator-grahams-cliff/andrew-c-mccarthy>)

Finally, it has been asserted that the existence of Guantanamo Bay has served as a “recruitment tool” for terrorists and that the facility should be shut down for that reason. In fact, shutting down Guantanamo Bay detention operations would rightly be seen by the jihadist movement worldwide as evidence of our submission, and a greatly emboldening victory. It would likely have the effect of *increasing* recruitment, while at the same time denying us a vital tool for incarcerating and interrogating those we capture rather than kill.

What is more, such a victory would embolden not only the violent jihadists, but also the *pre-violent* jihadists (most prominently the Muslim Brotherhood), here and abroad. The latter seek the same outcome as the former – the imposition globally of shariah under the rule of a new caliphate. The only difference is one of tactics driven by the Brotherhood’s perception that, for the moment, the correlation of forces is not conducive to success via direct and violent forms of jihad.

Conclusion

For all of these reasons, it is, in my professional judgment, not only desirable but necessary to continue to incarcerate detainees at Guantanamo Bay. We should, moreover, be free to add to their number at Gitmo, if that will help us gather vital intelligence and keep dangerous jihadist enemy combatants off the battlefield.

I will be happy to address your questions. Thank you.

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**TESTIMONY OF
ELISA MASSIMINO
PRESIDENT AND CEO
HUMAN RIGHTS FIRST**

HEARING ON

**CLOSING GUANTANAMO:
The National Security, Fiscal, and Human Rights Implications**

**BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS
JULY 24, 2013**

Introduction

Chairman Durbin, Ranking Member Cruz and Members of the Subcommittee, thank you for inviting me to be here today to share my perspective on the national security, fiscal and human rights implications of our policies at the Guantanamo Bay Detention Center. We are deeply grateful to this subcommittee and to you, Mr. Chairman, for your leadership on this and so many other human rights issues. Your tireless commitment to keeping human rights on the agenda of the United States Congress helps to ensure that our nation lives up to its ideals, and can lead the world by example.

My name is Elisa Massimino. I am the President and Chief Executive Officer of Human Rights First. Human Rights First is one of the nation's leading advocacy and action organizations, and the only group whose central mission is to advance American global leadership on human rights. We believe that upholding human rights is not only a moral obligation; it is a vital national interest. America is strongest when our policies and actions match our values. For 35 years, Human Rights First has worked to ensure that our country is a beacon on human rights in a world that sorely needs American leadership.

Human Rights First is non-profit and nonpartisan. To maintain our independence, we accept no government funding. Our work focuses on building coalitions with frontline activists, lawyers, and religious, military, and business leaders to develop pragmatic and bi-partisan solutions to the toughest human rights challenges where American leadership is essential.

Human Rights First is an American organization and, since 9/11, much of our work has focused on ensuring that our country stays true to its values, even as it confronts the threat of terrorism. We know from our 35 years of work around the world that what the United States does—particularly on human rights—matters deeply. In the aftermath of WWII, it was an American—Eleanor Roosevelt—who led the effort to develop a global consensus on the inherent rights and dignity of all people. Now, as then, American leadership is essential to build a world in which those universal rights are universally respected.

That is why we have focused so much of our energy and attention on getting this right. For the last decade, Human Rights First has worked with a group of retired generals and admirals, as well as law enforcement officials, professional interrogators, faith organizations and others to promote effective security policies that respect the rule of law and human rights, and uphold American ideals and universal values. We have challenged arbitrary detention, torture and other cruel treatment in the wake of post-9/11 abuses. We have worked for the restoration of habeas corpus. We have served as official observers to every military commission convened at Guantánamo. And we have published a series of groundbreaking reports on Guantanamo and other aspects of U.S. detention policy. Our report, *IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS*¹, written by two respected former federal prosecutors, examines more than 120 terrorism cases prosecuted over the past 15 years and concludes that the

¹ RICHARD B. ZABEL AND JAMES J. BENJAMIN, *IN PURSUIT OF JUSTICE* 65 (Human Rights First 2008).

federal system has capably handled important, complex, and challenging international terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process.

Closing Guantanamo has proven to be more difficult than many anticipated. There are tough questions to resolve, to be sure, but it is possible to close the detention facility with smart and sustained leadership from the President and Congress. Our new paper, **GUANTANAMO: A COMPREHENSIVE EXIT STRATEGY**, which we are releasing today, provides a roadmap for closing Guantánamo, with practical guidance on how to address the challenges of risk management raised by transferring detainees out of the facility.

I. Why We Need to Close Guantanamo

In a world that for many is characterized by tyranny, war, and injustice, the United States stands as a beacon. Despite our many failings, the United States has a long history of advancing human rights, having played a leading role in developing the international laws and standards that define and enforce them, and continuing today by protecting refugees and supporting human rights defenders on the frontlines of the struggle for freedom in many countries around the world. Domestically, respect for freedom, democracy, and the rule of law defines our political culture and constitutional system, setting an example for people around the world who seek to advance democracy and human rights in their own societies.

A glaring exception to this narrative is the post-9/11 abuses committed by our government, defined largely by Guantanamo and the torture of detainees in U.S. custody. It's hard to overstate how much this has undermined our country's moral standing and credibility. In my role as the head of an international human rights organization, the scenarios in which I most often hear about Guantanamo are not in our domestic political debates here at home or in our courts. I hear Guantanamo raised by officials of repressive governments who use it to deflect criticism of their own policies by charging hypocrisy. And I hear about Guantanamo from human rights defenders around the world who tell me that the best thing the United States can do to support their bids for freedom and democracy is to make sure that our country can lead by example, including closing Guantanamo. Three years ago, I brought two dozen human rights and democracy activists from around the world to the White House to meet with President Obama, and that's exactly what they told him.

The ability of the United States to credibly push other governments to respect human rights is seriously compromised when we have failed to correct the post-9/11 abuses that have cast a shadow on America's foreign policy over the last decade. And that shadow will continue to loom large until Guantanamo is closed, and the policies of indefinite detention and military commission trials are ended.

There have been instances in the life of our relatively young country when we have pursued policies out of fear that we later realize are inconsistent with our values.

Sometimes it takes hearing the perspective of those outside our national community, who know the values for which we hold ourselves out, to remind us of who we are. Consider the perspective of some family members of Guantanamo detainees. Several have written letters to you in advance of this hearing, and I want to read a few excerpts from them.

Nabil Hadjarab is an Algerian man who has been detained at Guantanamo for over a decade without charge or trial. He has been unanimously cleared for transfer by our government's security and intelligence agencies. Here's what his uncle Ahmed Hadjarab wrote:

"I must admit that my perception of the United States of America has been severely tarnished by this issue. When in 2002, I was told that Nabil was detained by the Americans; I thought that at least he would have a right to a fair trial. I thought his rights would be respected and that justice would prevail. What I feel today is mostly incomprehension. How can this nation, one that prides itself of defending Human Rights, close its eyes to these violations of its founding principles?"

Hisham Sliti from Tunisia has been held in Guantanamo for more than a decade without charge or trial. He has also been cleared for transfer. His mother, Maherzia Sliti, wrote:

"One of the worst things is the uncertainty, and the false hope that things are about to change. Sometimes I hear rumors that men have been released from Guantanamo and that Hisham is one of them. I miss and love my son so much that although my mind knows the rumors are probably false, my *heart* believes them every time. And every time I am devastated when I realize he is not coming home. I do not understand why my son is still in Guantanamo after all these years, when we know he has been cleared. We never thought the United States was the kind of place where people could be held like this."

Ahmed Belbacha, an Algerian, has been held since 2002 without charge or trial. He has been cleared for transfer. His brother Mohammed Belbacha wrote:

"My family is horrified at how Ahmed and others in Guantanamo have been treated. Algerian youth has long looked up to America for its democracy and respect for human rights. We always associated a lot of good with it. But now, America has lost its standing not just with our family, but with Algerian youth as a whole. Arbitrary arrest, detention without trial, renditions and torturous interrogation methods have cast a dark stain upon America's reputation."

These excerpts come from letters collected by Reprieve, a human rights organization that currently represents 15 prisoners in Guantanamo Bay and has provided assistance for many more. Attorneys and family members of Guantanamo detainees submitted the full versions of these and other letters to the hearing record. I encourage you to read them.

I raise these issues of justice and America's moral standing in the world because I want to be clear that what's at stake in figuring out a way to close Guantanamo is our ability to lead by example, and our reputation for upholding justice and the rule of law.

There are some who say that we need Guantanamo to hold and interrogate detainees that can't be tried in civilian court because they were captured by our military on the battlefield. But the military has never needed Guantanamo for battlefield captures; those detainees have typically been held in detention facilities in theater. Moreover, the vast majority of terrorism suspects captured abroad are dealt with by the security and law enforcement services of our foreign counterparts, and that's how it should be. Since 9/11, more than 120,000 suspected terrorists have been arrested around the world, and more than 35,000 have been convicted.² Our military cannot—and should not—be the world's police force or jailor.

In cases in which we have needed to detain, interrogate, and jail terrorism suspects, our civilian system has handled these cases remarkably well. Since 9/11, civilian federal courts have handled nearly 500 cases related to international terrorism, including at least 67 where suspects were captured abroad,³ often in inhospitable environments. Despite claims to the contrary, there is no credible evidence that trying these cases in civilian courts has caused breaches of sensitive national security information, or invited attacks on U.S. soil.

Nor does the civilian process preclude us from obtaining actionable intelligence to disrupt terrorism plots. The administration has established a High-Value Interrogation Group (HIG) that has been deployed in a number of cases to interrogate terrorism suspects using lawful and effective methods. Even in more routine terrorism cases, and in situations where Miranda rights and other due process protections are respected, offering plea deals and working with the defendant's family and lawyers, in addition to lawful interrogations, have produced a wealth of actionable intelligence information, including: telephone numbers and email addresses used by al Qaeda and other terrorist groups; information about al Qaeda communications methods and security protocols; information about their recruiting and financing methods; the location of al Qaeda training camps and safe houses; information on al Qaeda weapons programs; the identities of operatives involved in past attacks; and information about future plots to attack U.S. interests.⁴

By contrast, detention and trial at Guantanamo has proven highly problematic on several levels. Since 9/11, only 7 detainees have been convicted by military commission. Two of those convictions were recently overturned by a federal appeals court because the

² Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted For Terror Offenses Since September 11 Attacks*, AP, September 3, 2011, available at: http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html.

³ Deborah Pearlstein, *Counterterrorism in Court*, OPINIO JURIS, March 25, 2013, available at: <http://opiniojuris.org/2013/03/25/counterterrorism-in-court/>.

⁴ David Kris, *Law Enforcement as a Counterterrorism Tool*, JOURNAL OF NATIONAL SECURITY LAW AND POLICY, June 2011, at 85, available at: http://jnslp.com/wp-content/uploads/2011/06/01_David-Kris.pdf.

crimes with which the detainees were charged were not war crimes—the only acts over which military commissions have jurisdiction—at the time the offenses were committed. More broadly, in contrast to the civilian system, in Guantanamo—where detention is indefinite and Congress has made it difficult to effect transfers out of the prison—there is not the same kind of leverage (e.g., offering release or shorter detention in exchange for cooperation) to exploit with detainees.

There are other pragmatic reasons to move forward with closing Guantanamo. The impending end of combat operations in Afghanistan in 2014 increases the urgency for Congress and the administration to determine the disposition of all law-of-war detainees. The detainees at Guantanamo were apprehended and detained pursuant to the 2001 Authorization for Use of Military Force. As hostilities come to an end, Guantanamo detainees will have a legitimate claim before the courts that they should be released. Congress and the administration should proactively determine the lawful disposition of detainees now, or the courts could force those dispositions later.

There has long been a national security consensus that Guantanamo should be closed. More than 50 retired generals and admirals, along with three Secretaries of Defense—Gates, Panetta and Hagel—have called for Guantanamo to be closed. Today’s witnesses underscore that many senior military leaders believe that closing Guantanamo is a national security imperative.

As a national security issue, closing Guantanamo should be beyond politics. And it has been in the past. In 2008, there was significant bipartisan consensus that Guantanamo should be closed. Then-President Bush said he wanted to close Guantanamo,⁵ as did then-candidates Obama and McCain.⁶ That consensus has started to re-emerge, with Senator McCain recently stating that Guantanamo should be closed, and emphasizing that it would be an “act of courage” to transfer detainees out of Guantanamo and into the United States as part of a plan to close the facility.

And Guantanamo can be closed—safely and securely. This is not to say that closing Guantanamo will be easy—it if were, Guantanamo would already be closed. There are difficult legal, practical, and political problems that must be addressed to move forward.

But there is a pragmatic path forward to close Guantanamo, if the administration and Congress demonstrate sustained and focused leadership to get the job done.

I want to spend a few minutes outlining this path forward.

II. A comprehensive plan for closing Guantanamo

⁵ *Bush Says He Wants To Close Guantanamo*, CBS NEWS/AP, February 11, 2009, available at: http://www.cbsnews.com/2100-250_162-1596464.html.

⁶ *The Candidates on Military Tribunals and Guantanamo Bay*, COUNCIL ON FOREIGN RELATIONS, August 24, 2008, available at: <http://www.cfr.org/world/candidates-military-tribunals-guantanamo-bay/p14751>.

In 2009, President Obama signed an executive order establishing an interagency taskforce to conduct a review and recommend lawful dispositions of the detainees being held at Guantanamo.⁷ Since then, 72 prisoners have been transferred, repatriated or resettled, and a number of other detainees have died—either by suicide or other causes—bringing the current detainee population down to 166.⁸ Transfers have stalled in part because of restrictions imposed by Congress in 2010, 2011 and 2012, and because the administration has failed to exercise the authority Congress gave it in 2012 under the National Defense Authorization Act to waive the transfer restrictions by invoking, among other requirements, national security interests.

Concerns about recidivism—the possibility that a released detainee may “return to the fight”⁹—are understandable, as they are in the criminal context. But, as many analysts have detailed, the claims about recidivism of detainees who have already been released are inflated. The claim by members of Congress and some in the media that 28% of former Guantanamo detainees have “rejoined the fight” or “returned to the battlefield”¹⁰ is highly misleading. It appears to be based on unreliable or unconfirmed reports of suspected activities, and in any event includes detainees that may not have participated in any terrorist plots or attacks. The process to evaluate potential transfers has changed since the prior administration to more accurately capture post-transfer risk, leading to fewer cases of recidivism for detainees transferred by the Obama administration. The Director of National Intelligence’s recidivism assessment should be revised to more accurately reflect the circumstances in which former detainees that have engaged in terrorist plots or attacks against the United States so that evaluation—and mitigation—of this risk is grounded in reality, not hyperbole.

Nonetheless, as senior military commanders have told me, transfers of detainees from Guantanamo—just as transfers of detainees out of detention facilities in Iraq and Afghanistan—have always been about risk management, not risk elimination. Some detainees pose little risk; others will pose more. Establishing a “zero tolerance for risk” policy with respect to individual detainees is neither wise nor necessary. Our military, intelligence, law enforcement, and diplomatic agencies, along with those of our foreign counterparts, can significantly mitigate the risks of transferring detainees out of Guantanamo through security assurances, monitoring, rehabilitation and other reasonable

⁷ Guantanamo Review Task Force, Final Report, January 22, 2010, *available at*: <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

⁸ Sarah Childress, *Four Obama Policies That Help Keep Guantanamo Open*, PBS/Frontline, May 1, 2013, *available at*: <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/four-obama-policies-that-help-keep-guantanamo-open/>.

⁹ The term “recidivism” is used in this testimony solely because of its widespread use in the detainee transfer context. However, the term is inaccurate here for two reasons. First, many detainees did not commit any crimes or acts of terrorism prior to being detained at Guantanamo and therefore any future act of terrorism would not constitute “recidivism.” Second, as is noted in the testimony, much of the conduct that is counted as recidivist does not actually entail criminal or terrorist activity.

¹⁰ Senator Kelly Ayotte, Floor Speech on Counterterrorism Policy (November 29, 2012), *available at*: <http://www.c-spanvideo.org/clip/4179700>.

measures. The risks associated with keeping Guantanamo open are harder to mitigate, and the harm is potentially far more lasting.

A. Disposition of the 86 detainees cleared for transfer.

Of the 166 detainees remaining at Guantanamo, 86 have already been cleared by all relevant law enforcement, defense, and intelligence agencies for transfer back home or to third countries. The United States has determined that those men should neither face trial nor be detained, and many were cleared for transfer by both the Bush and Obama administrations. Several of these men have languished at Guantanamo for more than eleven years, even as their home countries have demanded their return. To successfully transfer all or most of these 86 detainees, the administration should take the following steps.

The Secretary of Defense should certify transfers and issue national security waivers to the fullest extent possible consistent with applicable law. The current set of certification requirements, coupled with the national security waiver, provides the administration with the authority to transfer many, if not all,¹¹ of the 86 detainees who have already been cleared for transfer. In most cases, security assurances from, or changes in the political or security context in, the receiving country can be read to satisfy the remaining certification requirements that cannot be waived under the national security waiver. Efforts to negotiate any required assurances should begin immediately¹² and be given the highest priority under the direction of the Secretary of Defense, in concurrence with the Secretary of State and in consultation with the Director of National Intelligence, pursuant to the required statutory guidelines.

The administration should begin transferring individuals to Yemen on a case-by-case basis, while also expeditiously developing a rehabilitation program there that could facilitate transfers of cleared Yemeni detainees en bloc.¹³ Fifty-six of the 86 detainees cleared for transfer are from Yemen. Of those 56, 26 are cleared for transfer without conditions, and may be transferred now that the moratorium on transfers to Yemen has been lifted. The remaining 30 are conditionally cleared for transfer, and may be

¹¹ Some detainees likely cannot be transferred even with the flexibility in the certification requirements and national security waiver. For example, 5 detainees (1 from Sudan and 4 from Syria) cannot be repatriated because their home countries are considered state sponsors of terrorism, and transfers to such countries are prohibited.

¹² Detainees cannot be transferred without aggressive efforts to obtain any necessary assurances from foreign governments. At an average rate of 4 transfers over 18 months—the rate at which detainees were transferred out over the last 18 months—Guantanamo would not close until 2075.

¹³ Any rehabilitation program developed should be focused on providing services—job training, education, counseling, etc.—designed to reintegrate the Yemeni detainees into society, and should not be predicated on novel Yemeni legal authorities to hold detainees indefinitely without charge or trial. In cases in which Yemeni detainees may have violated Yemen's criminal laws, the United States should facilitate prosecutions in Yemen pursuant to international fair trial standards by sharing credible evidence of criminal wrongdoing.

transferred with improved security conditions in Yemen, an appropriate rehabilitation program, or where third-country resettlement becomes an option.¹⁴

The administration should transfer home the 17 cleared detainees who are from countries that have requested their return (other than Yemen, which has also requested its citizens back). Countries that have demanded the return of their cleared citizens include: Afghanistan (4),¹⁵ Algeria (5),¹⁶ Libya (1),¹⁷ Saudi Arabia (2)¹⁸, and Tunisia (5).¹⁹ However, in accordance with U.S. non-refoulement obligations,²⁰ where there are substantial grounds for believing that a detainee would be in danger of being subjected to torture or other forms of mistreatment if returned home, the administration should resettle such detainees in third countries.

The administration should transfer to third countries (including, possibly, the United States) the three Uighur detainees who cannot be repatriated to China based on their well-founded fear of persecution. The Uighurs are not part of al Qaeda, the Taliban or any “associated forces,” and do not pose a material threat to the United States. U.S. federal courts have ordered their release. Moreover, resettling such detainees here would place the United States in a stronger position to negotiate transfers of other detainees to third countries by demonstrating a willingness to share in the responsibility of resettlement.²¹

The administration should transfer home the five men whose countries have not, at least publicly, asked for their citizens back, including men from Mauritania, Morocco, the Palestinian Territories, Tajikistan, and the United Arab Emirates. These detainees should be repatriated home if their countries are willing to accept them and transfers can be

¹⁴ Guantanamo Review Task Force, Final Report, January 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

¹⁵ Jeremy Herb, *Karzai: Obama should close Gitmo*, THE HILL, May 2, 2013, available at: <http://thehill.com/blogs/delcon-hill/policy-and-strategy/297451-karzai-says-obama-should-close-guantanamo>.

¹⁶ Holly Manges Jones, *Guantanamo Algerians complained to visiting delegation about treatment: report*, JURIST, March 28, 2006, available at: <http://jurist.org/paperchase/2006/03/guantanamo-algerians-complained-to.php>.

¹⁷ *Tripoli seeks repatriation of Libyans held in Guantanamo*, AFP, January 22, 2009, available at: http://www.google.com/hostednews/afp/article/ALeqM5hB1BF1bdDW6AwSgT0i6bW_pi88dw.

¹⁸ One Saudi Arabian detainee, Shaker Aamer, has dual citizenship with the United Kingdom, which has also demanded his return.

¹⁹ Bouazza ben Bouazza, *Tunisia Mission Asks For Repatriation Of Guantanamo Bay Detainees*, AP, September 14, 2011, available at: http://www.huffingtonpost.com/2011/09/14/tunisia-mission-guantanamo_n_962920.html.

²⁰ The United States cannot rely exclusively on diplomatic assurances to prevent transfers to torture. An interagency task force established by executive order in 2009 provided recommendations designed to improve the administrative process for ensuring that U.S. transfers are consistent with its obligations under Article 3 of the CAT. However, the task force recommendations have not been made public. President Obama should direct the Department of Justice, in coordination with all other relevant agencies and departments, to make these recommendations public, as well as any information regarding how these recommendations are being applied in practice.

²¹ William Glaberson and Steven Erlanger, *Europe's Hedging on Inmates Clouds Guantanamo Plans*, N.Y. TIMES, March 16, 2009, available at: <http://www.nytimes.com/2009/03/16/world/16gitmo.html>.

effectuated consistent with non-refoulement obligations. If that is not possible, they should be resettled in third countries.

Finally, the administration should transfer to third countries the four Syrian detainees and one Sudanese detainee who cannot be repatriated because federal law prohibits transfers to Syria and Sudan as state sponsors of terrorism.

Congress has a role to play in facilitating the responsible closure of Guantanamo. The annual defense bill reported out of the Senate Armed Services Committee presents the opportunity for a compromise approach on the resettlement or repatriation of detainees. While it requires the Secretary of Defense to take steps to mitigate the risks of transfer and to consult with Congress about decisions made, it properly places such decisions with the defense and intelligence agencies that are better situated than Congress to make those decisions. This legislation places unnecessary restrictions on the President's ability to close Guantanamo, but it is certainly an improvement on the current absolute bar on transferring detainees to the U.S.

B. Disposition of the 34 detainees suspected of criminal conduct and slated for prosecution.

The Guantanamo Review Task Force designated 34 of the remaining 166 detainees at Guantanamo as eligible for prosecution before either a federal court or military commission. Recent federal appellate court decisions have overturned two military commission convictions because the crimes for which the detainees were convicted – material support and conspiracy – were not internationally-recognized war crimes at the time of the offense.²² As a result, there may now be only twenty men who could face trial by military commission,²³ though they and other detainees in this category could possibly face prosecution in an Article III federal court should Congress permit transfers to the United States for prosecution. In addition, the current 9/11 cases and the case of the alleged *USS Cole* bomber before military commissions have been beset with scandal (the CIA was discovered to have the ability to censor the proceedings)²⁴ and legal uncertainty (the presiding judge could not even rule whether the constitution applies).²⁵

²² For example, the D.C. Circuit recently overturned a military commission conviction in *Hamdan v. United States (Hamdan II)*, because the charge in that case—material support for terrorism—could not be considered an internationally recognized war crime at the time of the alleged criminal conduct. In a similar case, *Al-Bahlul v. United States*, the D.C. Circuit overturned another military commission conviction because a separate charge—conspiracy—also could not be considered an internationally recognized war crime.

²³ Carol Rosenberg, *Prosecutor: Court ruling cuts vision for Guantánamo war crimes trials*, MIAMI HERALD, June 16, 2013, available at: <http://www.miamiherald.com/2013/06/16/3455042/prosecutor-court-ruling-cuts.html>.

²⁴ Carol Rosenberg, *Guantanamo judge unplugs hidden censors from 9/11 trial*, MIAMI HERALD, January 31, 2013, available at: <http://www.miamiherald.com/2013/01/31/3210054/guantanamo-judge-unplugs-hidden.html>.

²⁵ John Knefel, *Justice at Guantanamo: From the Profound to the Absurd*, ROLLING STONE, June 13, 2013, available at: <http://www.rollingstone.com/politics/news/justice-at-guantanamo-from-the-profound-to-the-absurd-20130613>.

In order to resolve the cases of the 34 detainees in this category, Congress should pass the Senate version of the National Defense Authorization Act (S. 1197), reported out of the armed services committee, which removes the ban on use of Pentagon funds for transfers to the United States for prosecution, incarceration and medical treatment. The administration cannot currently issue national security waivers to ensure prosecution of these detainees; Congress must act.

If transfers to the United States are again allowed, the administration should transfer those already facing military commissions at Guantanamo to military commission trials in the United States in order to facilitate the closing of Guantanamo. Military commissions should be used only to resolve the legacy cases at Guantanamo, not to supplant Article III federal courts, which have proven more muscular and adept in counterterrorism prosecutions. Article III courts have four times the number of substantive criminal laws available to them for use against terrorism suspects—not to mention more than two hundred years of experience and precedent on which to rely.

The administration should therefore transfer any remaining detainees who can be charged with crimes to a civilian court in the United States, or to an appropriate foreign jurisdiction, where such transfers can be made consistent with applicable law. Ahmed Ghailani, a former Guantanamo detainee, was transferred to the Southern District of New York, convicted, and is now serving a life sentence.

The administration should transfer those already convicted to any appropriate high security federal prison, which can safely house detainees. There are 355 terrorism convicts serving sentences in United States federal prisons, including the only 9/11 defendant to stand trial—Zacarias Moussaoui—who was convicted in federal court and sentenced to life in prison as the alleged 20th hijacker on 9/11. Three Guantanamo detainees have already been convicted by military commission and are serving sentences at Guantanamo.²⁶ Those who suggest that detainees who have served their sentence would be set loose on the streets of America are misinformed. Any such person would be subject to mandatory deportation.

C. Disposition of the 46 detainees that have neither been charged with a crime nor been cleared for transfer.

The remaining 46 out of 166 detainees being held at Guantanamo will either have to be charged with a crime or, eventually, be released within some reasonable period of time at the end of combat operations in Afghanistan or some other appropriate marker of the end of hostilities.²⁷ That is what is required under the laws of war and our Constitution, and it is what we have done at the end of past conflicts. The United States transferred 10,000

²⁶ Ali Hamza Ahmad Suliman al Bahlul, Majid Khan and Noor Uthman Muhammed.

²⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross: Customary International Humanitarian Law 451, Vol 1, 2009, *available at*: http://www.icrc.org/customary-ihl/eng/docs/v1_rule_rule128.

prisoners to the Iraqi government at the end of the Iraq war,²⁸ and has already transferred control of thousands of detainees in Afghanistan to that country's government.²⁹ Finding a reasonable, lawful disposition for this group may be more challenging, but it is not insurmountable.

First, the administration must initiate the Periodic Review Board hearings pursuant to Executive Order 13567 for eligible detainees immediately under the direction of the Secretary of Defense. No congressional action is needed to do this. These hearings should be completed in a timely and effective manner to determine whether each detainee is eligible for transfer. In an encouraging development, the Pentagon has announced that PRB hearings will begin soon, though it has not said when, or established a timeline for completing the hearings.³⁰

The Periodic Review Boards should, consistent with the interests of national security, afford detainees access to evidence, counsel and other markers of due process to ensure a thorough and accurate review. The boards could determine that some number of men in this group is now eligible to be transferred because new evidence has surfaced, the political situation in their country has improved, their networks of influence have degraded, their health has deteriorated, or other factors, such that they no longer pose a significant risk.

The administration should also provide Periodic Review Board hearings for any detainees who were previously slated for prosecution whom the administration no longer intends to prosecute. Timely and effective hearings should determine whether continued detention is necessary to protect against a significant threat to the security of the United States.

The administration should also determine whether there are extant credible criminal charges in other foreign jurisdictions where the detainees could be tried.

The administration should determine whether the 10 Afghan detainees of the 46 held in this indefinite detention category can be repatriated to Afghanistan pursuant to a negotiated agreement with the Taliban or the government of Afghanistan. Likewise, the administration should determine whether the 26 Yemeni men held in this category can be transferred based on coordination with the state of Yemen. Long-term efforts by Yemen to institute a rehabilitation program could assist in the transition.

Lastly, the administration could transfer some number of Guantanamo detainees to the United States for continued detention or trial until the end of hostilities. Some have expressed concerns that doing so could embed the injustices of Guantanamo's indefinite

²⁸ Ann Riley, *US transfers control of Camp Taji prison to Iraq authorities*, JURIST, March 25, 2010, available at: <http://jurist.law.pitt.edu/paperchase/2010/03/us-transfers-control-of-camp-taji.php>.

²⁹ Rod Nordland, Michael R. Gordon and Alissa J. Rubin, *Karzai Has Nothing but Praise for U.S. Upon Bagram Prison Transfer*, N.Y. TIMES, March 25, 2013, available at: <http://www.nytimes.com/2013/03/26/world/asia/us-cedes-control-almost-on-afghan-prisoners.html>.

³⁰ Carol Rosenberg, *Pentagon prepares review panel for 71 Guantanamo detainees*, MIAMI HERALD, July 21, 2013, available at: <http://www.miamiherald.com/2013/07/21/3512527/pentagon-prepares-parole-board.html>.

detention scheme in domestic practice. While we don't discount those concerns, we believe that with appropriate safeguards to ensure against the use of indefinite detention and military trial authorities for future captures, transfer of detainees to the United States is an acceptable option in furtherance of a broader effort to close Guantanamo. The Government Accountability Office has documented³¹ the high security prison facilities in the United States with capacity that could hold detainees.³²

To the extent that the administration has not resolved the disposition of any detainees prior to the end of hostilities, the administration should repatriate or resettle these detainees at the end of combat operations in Afghanistan or some other reasonable marker of the end of hostilities.

III. Conclusion

In one sense, closing Guantanamo is a numbers problem—how to get from 166 to zero. Once there were 779 prisoners at Guantanamo. The Bush administration resettled or repatriated more than 500 of them. The Obama Administration has gotten that number down to 166, a majority of whom have been cleared for transfer by the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. The remaining task is about managing risk to achieve an important national security objective on which there is bipartisan consensus. The risks of transfer can be mitigated; the risks of maintaining Guantanamo forever cannot.

But in another sense, closing Guantanamo is about who we are as a Nation. As the President recently said:

"I know the politics are hard. But history will cast a harsh judgment on this aspect of our fight against terrorism, and those of us who fail to end it. Imagine a future – ten years from now, or twenty years from now – when the United States of America is still holding people who have been charged with no crime on a piece of land that is not a part of our country. Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. Is that who we are?"

At a certain point, who we are as a Nation cannot be separated from what we do. Guantanamo is a symbol for many around the world of torture, injustice and illegitimacy. As the United States winds down the war in Afghanistan, Congress and the President

³¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-31, GUANTANAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES (2012), *available at*: <http://www.gao.gov/assets/660/650032.pdf>.

³² Conditions of detention must be commensurate with those required by the "humane treatment" provisions of the Geneva Conventions' Common Article 3. In addition, provisions of the Third and Fourth Geneva Conventions applicable to prisoners of war and civilians can provide substantial guidance for detention conditions that can be easily implemented to meet the security interest of the United States. No Guantanamo detainee should be subjected to conditions of confinement that are worse than what they are currently experiencing at Guantanamo.

have the opportunity to transform this legacy and restore America's reputation for justice and the rule of law.

I urge you to align our actions with our ideals and work with the President to get this done.

United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights
Senator Dick Durbin, Chairman

**“Closing Guantanamo: The National Security, Fiscal and Human Rights Implications”
Wednesday, July 24, 2013**

It has been more than 11 years since the Bush Administration established the detention center at Guantanamo Bay. In that time, I have spoken on the Senate floor more than 65 times about the need to close this prison.

I never imagined that in the year 2013 not only would Guantanamo still be open, but some would be arguing that we should keep it open indefinitely.

The reality is that every day that it remains open, Guantanamo prison weakens our alliances, inspires our enemies, and calls into question our commitment to human rights.

Time and again, our most senior national security and military leaders have called for the closure of Guantanamo. And listen to retired Air Force Major Matthew Alexander, who led the interrogation team that tracked down Al-Zarqawi, the leader of Al-Qaeda in Iraq. Here is what he said:

I listened time and time again to foreign fighters, and Sunni Iraqis, state that the number one reason they had decided to pick up arms and join Al Qaeda was the abuses at Abu Ghraib and the authorized torture and abuse at Guantanamo Bay. ... It's no exaggeration to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse.

In addition to the national security cost, every day that Guantanamo remains open, we are wasting taxpayer dollars. According to updated information that I received from the Defense Department just yesterday, Guantanamo Bay detention costs for Fiscal Year 2012 are \$448 million and for Fiscal Year 2013 the estimated costs are \$454 million.

In other words, we are spending \$2.7 million per year for each detainee held at Guantanamo Bay! Compare that with the estimated \$78,000 that it costs to hold a detainee in a federal supermaximum security prison.

This would be fiscally irresponsible during normal economic times, but it is even worse when the Defense Department is struggling to deal with the impact of sequestration, including furloughs and cut backs in training for our troops.

Every day, the soldiers and sailors serving at Guantanamo Bay are doing a magnificent job under difficult circumstances. But they are being asked to carry out an unsustainable policy of indefinite detention because we have failed to close Guantanamo prison.

Every day at Guantanamo Bay, dozens of detainees are being force-fed, a practice that the American Medical Association and International Red Cross condemn and that a federal judge recently found to be “painful, humiliating, and degrading.”

As President Obama asked, in his May 23rd national security speech: “Is this who we are? Is that something our Founders foresaw? Is that the America we want to leave our children? Our sense of justice is stronger than that.”

It is worth taking a moment to recall the history of Guantanamo Bay.

After 9/11, the Bush Administration decided to set aside the Geneva Conventions, which have served us well in past conflicts, and set up an offshore prison in Guantanamo in order to evade the requirements of our Constitution.

John Yoo wrote in a December 28, 2001, Office of Legal Counsel memo to Jim Haynes that Guantanamo was the “legal equivalent of outer space” – a perfect place to escape the law. But others, even within the Bush Administration, disagreed.

General Colin Powell, who was then the Secretary of State, objected. He said disregarding our treaty obligations, quote, “will reverse over a century of U.S. policy and practice ... and undermine the protections of the law of war for our own troops ... It will undermine public support among critical allies, making military cooperation more difficult to sustain.”

Then, Defense Secretary Donald Rumsfeld approved the use of abusive interrogation techniques at Guantanamo.

These techniques became the “bedrock” for interrogation policy in Iraq, according to a Defense Department investigation.

The horrible images that emerged from Abu Ghraib have seared into our memories some of these techniques, including forced nudity, threatening detainees with dogs, and placing detainees in painful stress positions.

Guantanamo became an international embarrassment, and the Supreme Court repeatedly struck down the Administration’s detention policies. As Justice Sandra Day O’Connor famously wrote for the majority in the *Hamdi* case, “A state of war is not a blank check for the President.”

By 2006, even President Bush said that he wanted to close Guantanamo. And in 2008, the Presidential candidates of both parties supported closing the prison.

Within 48 hours of his inauguration, President Obama issued Executive Orders prohibiting torture and setting up a review process for all of the Guantanamo detainees.

I’ll be the first to acknowledge that the Administration could be doing more to close Guantanamo. Last week, Senator Feinstein and I met with senior White House officials to discuss what they are doing under existing law to transfer detainees out of Guantanamo.

But let's be clear. The President's authority has been limited by Congress. We have enacted restrictions on detainee transfers –including a ban on transfers to the United States – that make it nearly impossible to actually close the facility.

It's time to lift these restrictions and move forward with shutting down Guantanamo prison. We can transfer most of the detainees to foreign countries. And we can bring the others to the United States, where they can be tried in federal court or held under the law of war until the end of hostilities.

Look at the track record. Since 9/11, nearly 500 terrorists have been tried and convicted in federal courts and are now being safely held in federal prisons. And no one has ever escaped from a federal supermax prison or a military prison.

In contrast, only six individuals have been convicted by military commissions and two of these convictions have been overturned by the courts. And today, nearly twelve years after the 9/11 attacks, the architects of the 9/11 attacks are still awaiting trial at Guantanamo.

During his confirmation hearing, I discussed this with Jim Comey, who was Deputy Attorney General in the Bush Administration and has been nominated to be FBI Director. Mr. Comey told me, "We have about a 20-year track record in handling particularly Al Qaeda cases in federal courts ... the federal courts and federal prosecutors are effective at accomplishing two goals in every one of these situations: getting information and incapacitating the terrorists."

Some may argue that we cannot close Guantanamo because of the risk that some detainees may join engage in terrorist activities. But studies show that the recidivism rates in U.S. prisons are more than 40 percent, far higher than the rate for Guantanamo.

And the often-quoted recidivism estimate includes hundreds of detainees who were transferred during the Bush Administration, before a strict process was put in place to screen detainees for transfer, work with host countries to mitigate any risks and implement appropriate security measures.

No one is suggesting that closing Guantanamo is risk free or that no detainees will ever engage in terrorist activities if they are transferred. But if a former detainee does return to terrorism, he will likely meet the fate of Saeed al-Shehri, the number 2 official in Al Qaeda in the Arabian Peninsula, who was recently killed in drone strike.

The bottom line is that our national security and military leaders have concluded that the risk of keeping Guantanamo open far outweighs the risk of closing it because the facility continues to harm our alliances and serve as a recruitment tool for terrorists.

It's time to end this sad chapter of our history. 11 years is far too long. We need to close Guantanamo.

**Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing on
“Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications”
July 24, 2013**

I want to thank Senator Durbin for holding this hearing today on the important matter of closing the detention facility at Guantanamo Bay, Cuba. It is long past time that we take action and end this unfortunate chapter in our nation's history. For over a decade, the indefinite detention of prisoners at Guantanamo has contradicted our most basic principles of justice, degraded our international standing, and harmed our national security. It is shameful that we are still debating this issue.

As long as the detention facility at Guantanamo Bay remains open it will continue to serve as a recruiting tool for terrorists and discredit America's historic role as a human rights leader. Countries that champion the rule of law and human rights do not lock away prisoners indefinitely without charge or trial. They do not strap prisoners down and forcibly feed them against their will. We condemn authoritarian states that carry out such practices and we should not tolerate them for even our worst enemies.

We must also face the hard economic truth about the cost of Guantanamo. At a time of deep budget cuts and furloughs at the Department of Defense, we continue to spend almost \$1 million annually per detainee at Guantanamo. By comparison, it costs less than \$65,000 per year to hold a prisoner at America's most secure Federal prisons, which have housed hundreds of convicted terrorists for decades.

And despite calls by President Obama to close the facility, the military is set to spend hundreds of millions of dollars more to overhaul the compound. For more than a decade, precious manpower, resources, and money have been squandered on this long-failed experiment instead of being directed to important national security missions at home and abroad. This waste must end.

Furthermore, the military commission system for trying these detainees is not working. Federal courts have recently overturned two convictions at Guantanamo in opinions that will prevent the military from bringing conspiracy and material support charges against detainees – something that even the lead military prosecutor at Guantanamo himself acknowledged.

These same charges can be pursued, however, in Federal courts where our prosecutors have a strong track record of obtaining long prison sentences against those who seek to do us harm. Since 9/11, Federal courts have convicted nearly 500 terrorism suspects who remain safely and securely behind bars.

The status quo at Guantanamo is untenable and I appreciate President Obama's renewed vow to shutter this unnecessary, expensive, and inefficient prison. His decision in June to appoint a new special envoy at the State Department to coordinate efforts to repatriate detainees is a positive step towards closing the facility. So too are reports that the Periodic Review Boards will soon

begin reviewing cases. I hope and expect that the President's leadership will result in ongoing forward movement by the Executive Branch.

But in order for the President's plan to be successful, Congress must also do its part. I was pleased to see the common sense provisions that were included in this year's National Defense Authorization Act that was recently reported by the Senate Armed Services Committee. While incremental, these provisions would make important changes to the onerous transfer certification requirements and prohibitions that have made closing Guantanamo all but impossible.

I look forward to working with other Members of Congress to ensure that these changes become law. We must remove the unnecessary statutory impediments that have ground to a halt the process of transferring detainees.

I remain determined to close this facility. It is the fiscally responsible thing to do, it is the morally responsible thing to do, and it is necessary to strengthen our national security. I thank Senator Durbin for his continued leadership and persistence on these issues and look forward to hearing from the witnesses here today.

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QUESTIONS FOR THE RECORD

For Major General Paul Eaton

From Senator Amy Klobuchar

"CLOSING GUANTANAMO: THE NATIONAL SECURITY, FISCAL, AND HUMAN RIGHTS IMPLICATIONS"

July 24, 2013

Detainee Policy

- Closing Guantanamo is important and would end a troubling period in our country's history. But we also need to look to the future. We are almost certain to face continued threats from transnational terrorists who will try to attack the United States at home and overseas. We will end up capturing, detaining, and interrogating some of them. We need to ensure we have a clear policy for how to handle them.
 - Do you believe the United States currently has a clear policy for handling foreign terror detainees?
 - What key elements would you focus on in crafting detainee policy for foreign terror suspects?

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For Lieutenant Joshua Fryday

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For Frank Gaffney

From Senator Amy Klobuchar

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For Elisa Massimino

From Senator Amy Klobuchar

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Article III Courts

- New laws have been passed and Article III court procedures have been updated over the past several years to try to enhance the legal system's ability to successfully try terrorism suspects.
 - Are Article III courts better able to handle terrorism cases today than before 9/11? Which changes do you think are most significant?

QUESTIONS FOR THE RECORD

For Brigadier General Stephen Xenakis

From Senator Amy Klobuchar

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- **Do you believe the United States currently has a clear policy for handling foreign terror detainees?**

Yes.

For those non-US citizens who commit criminal acts in the United States, whether categorized as acts of terror or not, the United States Federal Court system, specifically under Article III, has jurisdiction. Our judicial system has proven itself effective and efficient in handling hundreds of cases of foreigner perpetrated acts of criminality/terror. Our judges have managed to maintain the dignity of the courts, the proper handling of classified information and proper case disposition. Our prosecutors have achieved a very high conviction rate and those convicted of crimes are incarcerated in our federal prison system, where none have escaped.

For those non-US citizens who commit criminal/terror acts against the United States outside US borders, we have systems in play under US law and covered by many bi-lateral treaties, to kill or capture the perpetrator. Should the perpetrator be captured, we have mechanisms to bring him/her back to the United States for detention and trial in the same manner conducted for criminal/terror acts committed inside our borders.

The Guantanamo Detention Facility is an unnecessary and expensive alternative to the above discussion. Its existence is in fact a deterrent to the extradition of criminals/terrorists for trial and detention, and a remarkably effective recruitment tool for non-state terrorist organizations.

- **What key elements would you focus on in crafting detainee policy for foreign terror suspects?**

The most important element is to get the military out of what is really a civilian law enforcement problem. Non-state criminal/terror actors, or, un-privileged belligerents (unlawful combatant, illegal combatant), should be tried in the US judicial system. Those who directly engage in armed conflict in violation of the laws of war should be detained and tried according to the US Constitution and our very mature Article III Federal Courts. Articles 4 and 5 of GCIII are very clear in distinguishing between privileged and un-privileged combatants.

A second element is to better illustrate to the American people and to our allies the propriety of our judicial system to handle cases that should remain in our domestic courts and to dispel the notion that overseas detention and the use of the US military to adjudicate criminal/terror acts is counter-productive to US national interests.

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- **Do you believe the United States currently has a clear policy for handling foreign terror detainees?**

As the war winds down in Afghanistan, law of war detention will no longer be a viable policy option. Outside of Afghanistan, the Obama administration had relied on the improved capacity and capability of a whole of government approach to capture, detain, and interrogate terrorism suspects to protect Americans and American interests.

First, the Obama Administration has relied on U.S. federal courts to prosecute terrorism crimes. Article III federal courts have successfully adjudicated nearly 500 international terrorism cases since 9/11¹, 67 of which involved foreign terrorism suspects apprehended overseas². According to a report by the Government Accountability Office, 98 detention facilities within the United States already hold 373 individuals convicted of terrorism or terrorism-related offenses.³ The United States has collaborated with our allies to extradite terrorism suspects for prosecution in the United States, including the recent cases of Abu Ghaith, Osama bin Laden's son-in-law, and Spin Ghul, an alleged al Qaeda operative. Article III prosecutions are

¹ Dep't of Justice Nat'l Security Div., *Statistics on Unsealed Terrorism and Terrorism-Related Convictions 9/11/01-12/31/11*, available at: <http://www.humanrightsfirst.org/wp-content/uploads/DOJ-Terrorism-Related-Convictions.pdf>.

² Deborah Pearlstein, Counterterrorism in Court, OPINIO JURIS, March 25, 2013, available at: <http://opiniojuris.org/2013/03/25/counterterrorism-in-court/>.

³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-31, GUANTANAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES (2012), available at: <http://www.gao.gov/assets/660/650032.pdf>.

a marked improvement over indefinite detention and military commissions at Guantanamo, which undermine U.S. global leadership on human rights, pose substantial legal problems, and compromise national security.

Second, the Obama administration has worked closely with foreign governments to facilitate prosecutions of terrorism suspects in their own jurisdictions. Through the Global Counterterrorism Forum—which brings together 29 countries plus the European Union—and bilateral assistance, the United States has helped lay a foundation for the lawful prosecution of thousands of terrorism suspects overseas since 9/11.

Third, the Obama administration has established a high-value interrogation group (HIG) that brings together key assets from the various law enforcement, defense, and intelligence agencies to conduct safe, lawful, and effective interrogations. Elements of the HIG have been deployed at least 14 times⁴, including to interrogate suspects in the Times Square and Boston Marathon bombings, as well as terrorism suspects apprehended overseas.

Lawful interrogations and prosecutions have produced valuable intelligence that has kept Americans safe, including: telephone numbers and email addresses used by al Qaeda and other terrorist groups; information about al Qaeda communications methods and security protocols; information about their recruiting and financing methods; the location of al Qaeda training camps and safe houses; information on al Qaeda weapons programs; the identities of operatives involved in past attacks; and information about future plots to attack U.S. interests.⁵

○ **What key elements would you focus on in crafting detainee policy for foreign terror suspects?**

The end of war in Afghanistan will require the United States to determine lawful dispositions of all law of war detainees. Current detainee policy should focus on how to resolve the remaining cases of the 166 Guantanamo detainees. Human Rights First produced a white paper, “Guantanamo: A Comprehensive Exit Strategy” that builds on the comprehensive framework established by the Obama administration in the 2010 Guantanamo Review Task Force.⁶

⁴ Carol Cratty and Pam Benson, *Special Terror Interrogation Group Used 14 Times in Last Two Years*, CNN, March 7, 2012, available at: <http://security.blogs.cnn.com/2012/03/07/special-terror-interrogation-group-used-14-times-in-last-two-years/>.

⁵ David Kris, *Law Enforcement as a Counterterrorism Tool*, JOURNAL OF NATIONAL SECURITY LAW AND POLICY, June 2011, at 85, available at: http://inslp.com/wp-content/uploads/2011/06/01_David-Kris.pdf.

⁶ Guantanamo: A Comprehensive Exit Strategy, Human Rights First (2013), available at: <http://www.humanrightsfirst.org/uploads/pdfs/close-GTMO-july-2013.pdf>.

Article III Courts

- New laws have been passed and Article III court procedures have been updated over the past several years to try to enhance the legal system's ability to successfully try terrorism suspects.
- **Are Article III courts better able to handle terrorism cases today than before 9/11? Which changes do you think are most significant?**

Federal courts have successfully adjudicated nearly 500 international terrorism related cases since 9/11⁷, 67⁸ of which involved foreign terrorism suspects captured overseas. As Human Rights First has documented in a report, *In Pursuit of Justice*⁹, written by experienced federal prosecutors, federal courts have the history, experience, and precedent to successfully prosecute terrorism cases, in sharp contrast to military tribunals. Since 9/11, there have been important, if controversial, reforms to the substantive and procedural law governing Article III terrorism prosecutions, including: changes to the Foreign Intelligence Surveillance Act to allow additional collection and use of foreign intelligence information for prosecutions; clarification of the scope of certain terrorism crimes—such as material support for terrorism—to overseas conduct; and refinements to methods for handling classified information in court.

⁷ Dep't of Justice Nat'l Security Div., *Statistics on Unsealed Terrorism and Terrorism-Related Convictions 9/11/01-12/31/11*, available at: <http://www.humanrightsfirst.org/wp-content/uploads/DOJ-Terrorism-Related-Convictions.pdf>.

⁸ Deborah Pearlstein, Counterterrorism in Court, OPINIO JURIS, March 25, 2013, available at: <http://opiniojuris.org/2013/03/25/counterterrorism-in-court/>.

⁹ RICHARD B. ZABEL AND JAMES J. BENJAMIN, IN PURSUIT OF JUSTICE 65 (Human Rights First 2008).

QUESTIONS FOR THE RECORD

For Brigadier General Stephen Xenakis

From Senator Amy Klobuchar

"CLOSING GUANTANAMO: THE NATIONAL SECURITY, FISCAL, AND HUMAN RIGHTS IMPLICATIONS"

July 24, 2013

Responses inserted BG (Ret) Stephen N. Xenakis, M.D.

Detainee Policy

- Closing Guantanamo is important and would end a troubling period in our country's history. But we also need to look to the future. We are almost certain to face continued threats from transnational terrorists who will try to attack the United States at home and overseas. We will end up capturing, detaining, and interrogating some of them. We need to ensure we have a clear policy for how to handle them.
 - Do you believe the United States currently has a clear policy for handling foreign terror detainees?
- **Dr. Xenakis responds** Apart from the anomaly of Guantanamo, the United States appears to have a policy preference for interrogation and prosecution of terrorism suspects by civilian authorities in the domestic criminal justice system. Any policies being considered or developed may not be accessible to me as a medical expert. Nonetheless, I presume that establishing effective policies and practices for handling foreign terror detainees would help allay the fears and anxieties of American citizens over prosecuting alleged terrorists in the continental United States.
 - What key elements would you focus on in crafting detainee policy for foreign terror suspects?
- **Dr. Xenakis responds** Effective policies aimed at handling foreign terror suspects are comprehensive. Based on my extensive interviews, assessments, and reviews of interrogation records of detainees in Guantánamo, basic elements for crafting detainee policy for foreign terror suspects include:
 1. Establishing the full range of programs and policies for apprehending, interrogating, and detaining suspects (including releasing them when appropriate). The elements of effective detainee policy are interdependent and do not stand alone from each other.
 2. Establishing effective and proven interrogation practices that do not involve abusive, cruel, or inhumane treatment or torture. Good practices explicitly reject the proposals and so-called enhanced interrogation techniques (EITs) of

the CIA. They conform to tactics and techniques typically used by the FBI and experienced operators in human intelligence.

3. Establishing procedures and practices for interrogation that are differentiated from gathering evidence for future prosecution. The debate over closing Guantánamo indicates that the public in general, and perhaps the Congress, do not distinguish between gathering intelligence on the battlefield and collecting evidence for court proceedings.
4. Establishing policies and practices that realistically ascertain the dangerousness and commitment to terrorism of the detainee at the point of apprehension. Despite the implementation of the High Interest Group (HIG), usual current policies and practices lump most detainees into a broad category of "terrorist" and indiscriminately attribute dangerousness to them. These policies lack realistic analysis of the background, circumstances, or battlefield conditions when the detainee was captured.
5. Effective practices for handling detainees must grade, more effectively than current procedures, the dangerousness and military threat of suspects when apprehended. My review of interrogation logs and collateral records reveals that military authorities did not distinguish between the leadership and frontline actors. The military and associated courts (The Military Commissions) have not differentiated the "generals and colonels" from the "sergeants and privates."
6. Expediting the transfer of "cleared" detainees from Guantánamo. Effectively crafting detainee policy for foreign terror suspects involves solid procedures for apprehending and prosecuting suspected terrorists and releasing them expeditiously when appropriate.
7. Stopping force-feeding of the hunger strikers. Hunger strikers are not engaging in tactics of asymmetrical warfare, but expressing their despair over indefinite detention. Effective policies for foreign terror suspects require appropriate release when not prosecuted or convicted for terrorist acts.
8. Guantánamo lacks an effective program for rehabilitation and transfer to appropriate locations of "cleared" detainees. Effective policy for foreign terror suspects requires backend programs for rehabilitation and transfer of detainees after detention.
9. The Government sequester of funding has downgraded operations in Guantánamo. It has constrained the base in its ability to sustain adequate capability for detaining foreign terror suspects for many years. My recent visit of August 12-16 indicates that the base does not have adequate medical support for the current population that is aging and incurring more serious illnesses. The detainees increasingly manifest symptoms of serious cardiac disease, cancer, and diabetes. The absence of standard diagnostic testing for seriously ill detainees adversely impacts medical support to this aging population.

Thank you for the opportunity to respond to these questions.

Respectfully,
Stephen N. Xenakis, M.D.
Brigadier General (Ret), U.S. Army

**FRANK GAFFNEY'S RESPONSES TO
QUESTIONS FOR THE RECORD BY SEN. KLOBUCHAR**

1) Do you believe the United States currently has a clear policy for handling foreign terror detainees?

The only really clear aspect of U.S. policy towards foreign terror detainees seems to be that we will not permit them to be brought to Guantanamo Bay. This is deplorable insofar as it has several undesirable repercussions:

Its practical effect is to incentivize our armed forces and intelligence personnel to kill, rather than capture, jihadists. Of course, doing so precludes the opportunity to debrief or interrogate them, foreclosing a source of potentially decisive information about the enemy's capabilities and intentions.

Under existing U.S. policy, if, for whatever reason, such terrorists *are* captured, we face two unsavory prospects: a) confining them in foreign detention centers over which we may have little or no control – and from which they may well be released, with or without the host country's assent; or b) bringing them into the United States, where they may benefit from constitutional rights and judicial proceedings that could severely restrict or actually preclude interrogation, and may result in their being freed, possibly inside the United States.

2) What key elements would you focus on in crafting detainee policy for foreign terror suspects?

I would respectfully suggest that we need a clear policy towards foreign terror detainees that places a premium, where practicable, on capturing – rather than killing – them and incarcerating them in a place with the following characteristics. It must be: secure and totally within U.S. control; sited and operated in such a way as to minimize risk to our service personnel and American communities; and located so as to minimize the possibility that federal judges will become involved in the disposition and treatment of such detainees, and be tempted improperly to apply a law enforcement paradigm with regard to such questions.

Of course, Guantanamo Bay has all of these attributes. I am unaware of another facility anywhere in the world of which that can be said.

QUESTIONS FOR THE RECORD

For Lieutenant Joshua Fryday

From Senator Amy Klobuchar

"CLOSING GUANTANAMO: THE NATIONAL SECURITY, FISCAL, AND HUMAN RIGHTS IMPLICATIONS"

July 24, 2013

Detainee Policy

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Question:

Do you believe the United States currently has a clear policy for handling foreign terror detainees?

Answer:

It is outside my current duties to comment on all policies for handling foreign terror detainees outside of Guantanamo Bay, Cuba.

However, the situation in Guantanamo, as it currently stands, reflects an untenable and unsustainable policy of indefinite detention. Accordingly, I believe our policies for handling foreign terror detainees should be amended and clarified.

We face serious threats. Our enemies must be pursued with the utmost intensity and vigilance. Criminals and terrorists should be prosecuted and jailed. Our enemies must be clear about our steadfast and dogged commitment to bring them to justice, and they must know we will not stop until we do.

At the same time, the law and our values require that we put the men in Guantanamo on trial and prove they are guilty. As a nation, we believe in due process, and as we amend these policies, we should always strive to be faithful to our most cherished values.

Question:

What key elements would you focus on in crafting detainee policy for foreign terror suspects?

Answer:

It is outside my current duties to comment on all policies, future or present, for handling foreign terror detainees outside of Guantanamo Bay, Cuba.

The situation in Guantanamo is unsustainable and demands our policies be revisited, amended and clarified. We are a nation of laws and high moral standards. We are a people of principle who believe in due process and innocence until proven guilty. On the eve of the Revolutionary war, we held trials for British Soldiers responsible for the Boston Massacre. Before we were even a nation, our founding father John Adams extolled the virtues of a people governed by the Rule-of-Law when he served as one of the British soldiers' defense lawyers. He set the example for the type of justice this new country would stand for.



Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications
July 24, 2013
Hearing Statement

Dear Senator Durbin and members of the Committee,

Thank you for considering this statement and the enclosed letters from family members of some of Reprieve's current and former clients in Guantánamo.

Only one letter is about a free man: the journalist Sami al-Hajj. Mr. al-Hajj was seized in 2001 covering the Afghan war for the Arabic news channel al-Jazeera. He was held without charge in Guantánamo until May 2008. At the time of his release, Sami had been on hunger strike for over a year. His young son, Mohammed, was a baby when Sami was taken, and effectively met his father on his release to Sudan.

The other prisoners remain in Guantánamo. Each relative speaks powerfully of the damage to America's reputation that Guantánamo still causes, to say nothing of the pain. To these sons, daughters, brothers, and mothers, their loved one might as well be a ghost, because they have no idea when he will come home.

Most of these prisoners have been on a hunger strike for months, as Sami was many years ago. This distresses their families at least as much as their original detention; they see it as a sign that their loved one no longer believes the President's concrete promise to set him free.

Reprieve is an organization based outside the United States, but has a number of security-cleared American staff. This offers us a unique perspective on Guantánamo's true cost. We work regularly with partners across the Muslim world – from Tunisia to Yemen to Pakistan. In the majority of the countries our American staff visit, Guantánamo remains the single greatest symbol of a US that, in the words of the President, 'flouts the rule of law.'

The current crisis in Guantánamo is the worst this Administration is likely to face and it is unlikely to go away any time soon. At the moment, below the Presidential level, we have seen military officials insisting on a degrading genital search policy and periodically claiming, oddly, that no force-feeding has taken place; Justice Department lawyers briefing that Guantánamo prisoners are non-persons with no free exercise rights; and, most importantly, not a single release since the start of the strike.

Numerous prisoners report that the situation at the base now is the worst of this Presidency and rivals some of the more troubled years under President George W. Bush. Our clients' fundamental grievance, however, has less to do with their current conditions than it does with their loss of faith that they will ever be released. It was not always so: hope surged in many of these men in January 2009, when President Obama signed his Executive Order to close Guantánamo. When a unanimous panel of intelligence agencies and the Defense and State Departments cleared them, many felt they would finally go home.

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Chair: Ken Macdonald QC

Patrons: Alan Bennett, Julie Christie, Martha Lane Fox, Gordon Roddick,
 Richard Rogers, Ruth Rogers, Jon Snow, Marina Warner and Vivienne Westwood

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All of this reflects poorly on the United States in the wider world. The government's response to the ongoing hunger strike will not merely determine President Obama's legacy; it will shape America's image in the Muslim world for years to come.

There are concrete steps available to end the strike. The most obvious – the one that most prisoners have said will persuade them to eat again – is the transfer of a cleared man to a safe place.

History will judge the Administration harshly if it leaves the Guantánamo detainees in stasis for many more months. History will be equally unkind, however, if the Administration seeks to silence prisoners' protest by sending them to autocracies where they are likely to be abused. Most of the families whose letters are enclosed hail from close US allies in Europe. Europe has a solid record – probably the best record – of successfully reintegrating ex-Guantánamo prisoners.

It is time to send a cleared man home to his family, be it Shaker Aamer to Britain or Nabil Hadjarab to France. This will end the strike without strife, or further anguish to these families.

Thank you for your timely and needed debate of these issues.

Cori Crider
Strategic Director
Reprieve

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Detainee: Adel Al-Hakimi
ISN: 168
Nationality: Tunisian
Family member: Emad Al-Hakimi (brother)
Residence of family member: Tunisia

Dear Senators,

My brother, Adel Al-Hakimi, has been in Guantanamo Bay since 2002. Eleven years is too long to be away from your loved ones.

Adel has a daughter whom he has never met. It's been hard on her, growing up without a father, and of course it is devastating for him.

The first time they ever spoke together was over an ICRC Skype call a couple of months ago. They were both so happy to finally be able to speak, but after eleven years, how do you even begin to have a relationship with your child from Guantánamo? When I speak to Adel from time to time, he gets the saddest when he speaks of his little girl.

My family and I have never stopped planning for his return—even though we have no idea when it will be. We can't stop hoping. Recently, I added a floor to the family home for Adel to live in when he returns. My mother, who has become elderly and frail waiting for him, does her best to retain her patience and hope. We all fear that she will die without seeing him again.

The worst part is that we don't know how much longer he will be in Guantanamo or if he will ever be released. We have been waiting for over a decade for some sort of resolution. We never knew that this type of injustice could happen in America. Adel has a simple dream: to return to Tunisia, to start a business, and to be a good father. How much longer will we have to wait before we can move on with our lives?

On behalf of my brothers, sisters, mother and his daughter I ask that you move forward and resolve Adel's case so that we will be able to move forward with our lives.

Thank you.

Sincerely,

Emad Al-Hakimi

Detainee: Nabil Hadjarab
ISN: 238
Nationality: Algerian
Family member: Ahmed Hadjarab (uncle)
Residence of family member: France

Dear members of the United States Senate,

It is with great honour that I am writing to you today on behalf of my nephew Nabil Hadjarab, imprisoned in Guantanamo since 2002. I understand that he has been on hunger strike for over 150 days.

My name is Ahmed Hadjarab. I have lived in France since 1961 with my wife and my five children. All of Nabil's remaining family are French. After the death of Nabil's father in 1992, he became like my sixth child: I took him under my responsibility.

Since the hunger strike begun, Nabil tells me that he has lost around 44lbs. The Guantanamo staff force-feed him twice a day, in a way he finds brutal and degrading.

On our occasional Skype calls, Nabil describes to me what he has to go through every day. Soldiers make him come out of his cell, and strap him to a chair. A member of the medical staff then inserts a tube in his nose, all the way down to his stomach while his head is held back.

Nabil has been going through this barbaric procedure twice a day, every single day for over four months. It is very hard for me, helpless here, to hear him describe his suffering. Every time, it breaks my heart. Nabil's health is seriously threatened, he is extremely weak and his morale is at a low point. Cleared for release in 2007, and again in 2009, I do not understand why he is still in there.

On April 26, I went to Basel, where through the International Committee of the Red Cross I have occasional Skype calls with Nabil. But that day, I couldn't hear his voice. I was told that Nabil was too weak to even take the call; that in his state, he could barely stand up. This episode made me much more anxious. Nabil had always taken care of himself. He always put his health and his body first. In my opinion, this gesture, this hunger strike, shows a profound distress, a loss of hope.

Nabil is slowly giving up on any hope of a brighter future. It's very upsetting, but Nabil says he is slowly dying in Guantánamo, even though he has been cleared. My feeling is that his unlimited and indefinite detention, the constant uncertainty he is confronted to, is psychological torture. And even though I am not the main victim in this story, knowing that the one I consider to be my son is suffering so much has a terrible impact on me. I am broken, my appetite is gone, and I barely sleep. I have reached the point of psychological exhaustion.

For over ten years, I have lived in constant anxiety. Knowing that Nabil is over there, losing a little more of his meagre hope each and every day, causes me great pain.

In all honesty, and with the greatest respect to all of you who are reading this letter now, I must admit that my perception of the United States of America has been severely tarnished by this issue. When in 2002, I was told that Nabil was detained by the Americans; I thought that at least he would have a right to a fair trial. I thought his rights would be respected and that justice would prevail. What I feel today is mostly incomprehension. How can this nation, one that prides itself of defending Human Rights, close its eyes to these violations of its founding principles?

Thank you for the attention you will give to this message, and please accept, honourable members of the Senate, my highest regards.

Ahmed Hadjarab

Detainee: Hisham Sliti
ISN: 174
Nationality: Tunisian
Family member: Maherzia Sliti (mother)
Residence of family member: Tunisia

Dear Senators,

Thanks to you for reading this letter on behalf of our son, Hisham Sliti. He is Tunisian, like us, and has been cleared for release for many years.

My son has been away from me and his loved ones for over eleven years. We, his family, are waiting for him in Tunis. My husband and I live alone, and we are getting on in years. Our one wish is to hug him and to have him home before we pass away.

Forgive me if I seem to complain, but the truth is that losing our son to Guantanamo has had a terrible effect on us.

One of the worst things is the uncertainty, and the false hope that things are about to change. Sometimes I hear rumors that men have been released from Guantanamo and that Hisham is one of them. I miss and love my son so much that although my mind knows the rumors are probably false, my *heart* believes them every time. And every time I am devastated when I realize he is not coming home.

To try to cope with my depression I attend a support group with other family members, but it's hard to find the energy to go. We are depressed. Suffering without Hisham has exhausted us. I was recently diagnosed with cancer and had to go through difficult treatment. My biggest worry is that one or both of us will die before we see our son again. We are a close family, here, and we will look after him, if we have the chance.

When I think of Hisham, I remember him as a joker who loved to go out with his friends and play sports. When we speak to him every few months on a call, we feel a little bit better. But it is hard for me to imagine the life my son has now. I constantly replay in my mind the moment I was told Hisham was in prison. I am afraid I will never see him again.

Whenever I speak to my son I hear sadness and hopelessness in his voice. He tries to joke and hide his true feelings, but it never works. I go for months without hearing from him and I worry. I worry that he has lost hope and taken his life. I worry that he might become ill and die before he was able to come back home where he belongs.

I do not understand why my son is still in Guantanamo after all these years, when we know he has been cleared. We never thought the United States was the kind of place where people could be held like this. I ask you to help bring my son home so that I may have my family reunited before it is too late.

Sincerely,
Maherzia Sliti

Detainee: Abu Wa'el Dihab
ISN: 722
Nationality: Syrian
Family member: Kamal Massaud (uncle)
Residence of family member: Lebanon

Dear Senator,

My name is Kamal Massaud, and I am writing to raise my concerns about my nephew Abu Wa'el Dhiab, imprisoned in Guantanamo Bay for the last eleven years. He was cleared for release in 2009.

Abu Wa'el is 41 years old. However, his health is like that of an old man. A decade of imprisonment, torture and beatings has taken a dramatic toll on him. My nephew needs a wheelchair, and he has been on hunger strike for almost six months, which is making him even weaker. I worry about him every day, and every night.

I want Abu Wa'el to know that he is not alone, even if he is in solitary confinement. I cannot imagine how much he is suffering, especially with the hunger-strike and the force-feeding, but I certainly know how much pain it causes me not to know when he will be free.

Eleven years. I think how many things have happened in my life in that time, and it makes me painfully sad. His children have grown up without him, and his wife has raised the family alone.

His family live in Syria and of course it is incredibly difficult for them. His wife is a strong woman, but I know she suffers without her husband. The kids are extremely stressed, and as you know, the situation in Syria is terrible now.

His oldest daughter, Fatima, just got married and while of course it was a beautiful and happy occasion, all of us, especially Fatima, were sad that Abu Wael was not there to celebrate with us.

The way Abu Wa'el was seized, where he is, how he has been treated: all this hangs over the family every day. It feels to us that there is no real judicial process that reaches him in Guantánamo. We have never received any explanation from the US authorities. We have never understood, if I am honest, how he can be held without charge or trial for all these years.

I remember Abu Wa'el as a kid. Although I am his uncle, I am only four years older than him. We used to play football in the house, and always get told off by his mother. Memories of his childhood warm my heart for an instant, and then I can't help feeling this anguish again. I am grieving every day for a man who is not dead yet.

When your loved ones are in pain, you are in pain too. I hope this suffering can end soon for all of us.

Yours faithfully,
Kamal Massaud

Detainee: Shaker Aamer

ISN: 239

British Resident

Family members: Michael Aamer (son) & Johina Aamer (daughter)

Residence of family members: UK

Dear Senators,

My name is Michael Aamer and I am 13 years old. My dad, Shaker Aamer, is in Guantanamo.

It makes me so sad to know that even after trying to get him out, he is still in prison. And even though he has been cleared for release, he has been tortured.

I see my dad on skype when we speak to him. Sometimes a guard stands behind him. We have to be very careful about what we talk about—we can only talk about ourselves or the guards will stop the call.

Since I have grown up, I find it very difficult without my dad. I can feel how hard it is for my mum. I can't imagine how my dad is coping with all the ill-treatment he has been facing.

I always hear my friends talking about how their dads give them treats and presents. I feel really lonely knowing that I am the only one whose dad is away in prison.

I was very little when my dad was taken away, and I hope I won't have to wait too long before I can see him again.

Sincerely,

Michael Aamer

Dear Senators,

I am Johina Aamer. For over 11 years now, my dad Shaker Aamer has been detained in Guantanamo. Most men there could never be a threat to anyone. Why is there such injustice?

We all live our lives, passing through every day with food, clothes, and most importantly freedom. Can you imagine being locked up for 10 years? Imagine losing ten years of your life and possibly many more years to come if everyone sits there and does nothing about it. Try imagining being treated like a circus animal in a cage and being taken away from your home and everything you love. It is painful isn't it?

Well my dad has already been through this and is going through this now. I am fifteen years old, and I was just a little girl when he was taken away. My youngest brother Faris has never even met his dad.

Please Senators, I ask you to do something about it. We are a big family and we do our best to live a normal life, but without dad back home with us, it will never be possible.

Thank you for your time and attention.

Best Regards,

Johina Aamer

Detainee: Younous Chekkouri
ISN: 197
Nationality: Moroccan
Family member: Abd Alhaq Barka (uncle)
Residence of family member: Germany

Dear Senator,

My name is Abd Alhaq Barka, and I'm writing you regarding my nephew Younous Chekkouri, born on 4 May 1968, currently held in the U. S. prison of Guantanamo Bay.

My nephew Younous is cleared for release, yet he remains in Guantanamo. His young adulthood has been wasted during the 11 years of his detention. How many more years is he going to be in Guantanamo? I know this limbo is causing him a lot of pain, and I am suffering too because I know he has been very depressed lately. I worry about his health, and I spend sleepless nights thinking that he may do something to put an end to his anguish.

I want nothing more than for him to join me and our family in Germany. I am a German citizen and Germany has been my home for 40 years. I have worked hard to establish myself here, in the suburbs of Stuttgart, where I live with my wife and son.

Like us, Younous deserves the chance to rediscover what it means to live a life of freedom, peace, and security. We deserve the chance to see him again. Younous has a kind heart, and he is loved by many people in this world. His wife, his brother and myself, we all also suffer the consequences of his indefinite detention.

Younous' mother was my big sister. She took care of me and my siblings when our parents died. Younous' indefinite detention took a personal toll on his mother. Her mind, and eventually her body, could not take all this suffering. She passed away five years ago—seven years into Younous' imprisonment at Guantanamo. It breaks my heart that she didn't get to see her son before she died.

I am asking you today, members of the Senate, how much longer am I going to suffer this pain? How much longer can our family take this?

I hope one day soon Younous can be reunited with his loved ones. I hope one day we can all celebrate the joy of having Younous with us, instead of spending sleepless nights worrying about him and his fate.

Yours sincerely,

Abd Alhaq Barka

Detainee: Ahmed Belbacha
ISN: 290
Nationality: Algerian
Family member: Mohammed Belbacha (brother)
Residence of family member: Algeria

Dear Senators

My younger brother, Ahmed Belbacha, has been in Guantanamo since 2002. His health is deteriorating—especially since the hunger strike—and I am deeply worried about him.

I am six years older than Ahmed, and my image of him is as an athletic youngster whose passion for soccer seemed a strange match with his love for math and serious study. It's so hard now to hear him talk about his failing health and the unimaginable things he's been through over the last decade.

Ahmed's continued absence has cast a bitter shadow over our family. His indefinite detention and deteriorating health put the family under a lot of stress. Big holidays, such as Eid, are especially hard. The whole family gets together to celebrate and we feel Ahmed's absence even more strongly. We remember all the Eids we have had to spend without Ahmed, and we pray for this one to be the last.

Ahmed has thirteen nieces and nephews. All but one of them was born after Ahmed left the country, so he has never seen them. My brothers and sisters and I have decided not to tell the children that their uncle is detained—we worry about how it would affect them. Last time we were able to speak to Ahmed on the phone, my eldest son Abdelghani, who is ten, asked him when he would return. Ahmed couldn't bring himself to respond. Maintaining this secret from the children all these years has taken a toll on us.

My family is horrified at how Ahmed and others in Guantanamo have been treated. Algerian youth has long looked up to America for its democracy and respect for human rights. We always associated a lot of good with it. But now, America has lost its standing not just with our family, but with Algerian youth as a whole. Arbitrary arrest, detention without trial, renditions and torturous interrogation methods have cast a dark stain upon America's reputation.

My family still maintains hope that Ahmed will be released soon. We know he is exhausted after all he has suffered, but we also know that he retains a strong will to rebuild his life. We will do all we can to help Ahmed rebuild his life.

Yours sincerely,

Mohammed Belbacha.

Detainee: Sami Al Hajj (Released)

ISN: 345

Nationality: Sudanese

Family member: Mohamed Sami Al Hajj (son)

Residence of family member: Qatar

Dear Senators,

My name is Mohamed Sami Al Hajj and I am thirteen years old. I am writing today to tell you my story of growing up without my dad. It is not something I would wish on anyone, ever.

I was just a baby when my dad was taken in 2001 and I didn't have any brothers or sisters. Most kids my age have lots of happy memories from when they were little. But for me, I look back on a lot of sadness and an empty house. Not having my dad—and knowing that he was in Guantanamo—made me feel insecure and helpless.

I used to ask my mom lots of questions. Mostly I wanted to know when my dad would come home, but I also wanted to understand why he was there. There were never any real answers to either question. I think that the uncertainty was the hardest part. It made our lives so unstable. I also used to get angry at how unfair the whole thing was.

My mother used to try to comfort me by telling me stories about my dad—especially about how brave he was. She told me about how he was a camera man for Al Jazeera and went to dangerous places to uncover the truth. I loved hearing her talk about him and I longed for him to come home to us.

The day my dad came home was by far the best day of my life. Imagine meeting your dad for the first time! I was so anxious as I stood there waiting. And then when I saw him, I was so happy. But Dad was very weak. He had to stay in bed for a long while before he could be normal again.

Sometimes I want to forget about Guantanamo, but I can't. I think about it when I see my dad limp from his shattered knee and when he is weak and tired. Also, it's hard not to feel sad for all the families that still have fathers in Guantanamo.

For instance, I remember when I was eight, and I found out that my father was on a hunger strike, which was so scary. My mom tried to spare me the detail, but later I found out that my dad spent a month without any food. Then he was tied to a chair with metal shackles and brutally force fed. I remember so clearly how scary that time was for us, and it breaks my heart to hear in the news that this is happening again.

Thank you very much, Honorable Senators, for taking the time to listen to my letter. I really do hope that your efforts today will help other children find their fathers again.

Yours Sincerely,

Mohamed Sami Al Hajj

To: The members of the Senate Judiciary Committee
regarding amendments to the 2013 National Defense
Authorization Act (NDAA) relating to the prisoners held at
Guantanamo Bay, Cuba

From: Thomas P. Sullivan
July 22, 2013

Thank you for allowing me to express my views concerning proposed amendments to the 2013 NDAA relating to the prisoners held at Guantanamo Bay, Cuba. Although I have represented a number of prisoners during the past eight years, only one remains at Guantanamo Bay, Abdulrahman Suleiman, ISN 223, from Taiz Yemen. We have submitted to the Committee a letter from his mother, expressing her urgent, heartfelt desire to have her son back home.

There are approximately 150 men still imprisoned at Guantanamo Bay, most of whom have been there for a decade or more, who have not and will not be charged with commission of a crime against our country or its allies.

My purpose in writing this memorandum is to summarize why I believe that, while amendments to the 2013 NDAA may

make it easier to close the prison, there are in the law as now written provisions which allow the administration to transfer almost all of the prisoners who are still there.

1. *The Guantanamo Review Task Force Final Report, January 22, 2010.*

In January 2009, shortly after being sworn in, President Obama adopted Executive Order 13492, "calling for a prompt and comprehensive interagency review of the status of all individuals currently detained at Guantanamo Bay Naval Base and requiring the closure of the detention facilities there... The Executive Order was based on the finding that the appropriate disposition of all individuals detained at Guantanamo would further the national security and foreign policy interests of the United States and the interests of justice." Task Force Final Report, Jan. 22, 2010, Executive Summary, p. i. The agencies involved in the review were the departments of Justice, Defense, State, and Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff.

The Task Force reviewed the files of the prisoners then at the Naval Base prison, and in January 2010 reported as follows.

- ° The members unanimously approved 126 of the men for transfer to countries outside the United States; *86 of whom are still imprisoned.*

- ° 30 men from Yemen were approved for “conditional” release, subject to the President lifting the moratorium on transfers to Yemen, and other security conditions being met. We have been told that *the moratorium has been lifted, but the 30 men are still imprisoned.*

- ° 48 men were determined “too dangerous to transfer but not feasible for prosecution,” but *they “will periodically receive further review within the Executive Branch.”*

- ° 44 men were referred for criminal prosecution.

2. The President’s Executive Order 13567, March 7, 2011.

On March 7, 2011, the President adopted Executive Order 13567, which relates to the 48 men determined to be too dangerous to release, and the 44 men referred for criminal

prosecution. The Order directs the Secretary of Defense, in consultation with the Attorney General, to establish a Periodic Review Board (PRB), and provide each of those 92 men a hearing “no later than 1 year from the date of this order,” that is, by March 7, 2012. The Order contains detailed provisions as to how the PRB reviews are to be conducted. “The PRB shall make a prompt determination, by consensus and in writing, as to whether the detainee’s continued detention is warranted under the standard in section 2 of this order,” that is, whether “Continued law of war detention is warranted for a detainee...if it is necessary to protect against a significant threat to the security of the United States.” *I am informed that the PRBs have recently been established, more than a year after the President ordered. No hearings have yet been held.*

3. *The three ways in which the administration may now release almost all prisoners without further amendments to the 2013 NDAA.*

There are three methods the administration may currently use to transfer almost all the men who are not to be tried by military or civil courts for commission of crimes, which will probably reduce the prison's population to less than 20.

First. Section 1028 of the 2013 NDAA places restrictions on the President's use of funds appropriated by that statute for the transfer or release of non-United States citizen-prisoners to foreign countries. However, *explicitly exempted from the prohibitions are transfers ordered "by a court or competent tribunal of the United States having lawful jurisdiction."*

§§1028(a)(2), and (c)(2). Accordingly, the President, Attorney General or Secretary of Defense may apply to the District Court for the District of Columbia for agreed orders (or agreed writs of habeas corpus) authorizing release of named prisoners. If deemed appropriate, the orders may contain conditions and restrictions on the conduct of those released. The administration

may use funds appropriated under the 2013 NDAA for the relocation of the named prisoners to foreign countries.

Second. The administration may request the foreign countries to which the prisoners are to be relocated to provide the necessary transportation, by air or ship, to have the prisoners taken from the Naval Base to their countries, which will not involve the expenditure of funds appropriated by the 2013 NDAA. Any incidental expenses involved in arranging the transfers, and escorting the prisoners the short distance from the prison to the Guantanamo Bay airstrip or wharf, may be paid by the foreign country, or from funds available for the President's discretionary spending apart from NDAA appropriated funds, or from other readily available non-governmental sources. But even if not reimbursed, these minor expenses pale by comparison to the estimated \$1 million annual cost of maintaining each prisoner, resulting in a vast net savings of funds appropriated by the 2013 NDAA.


Third. The Secretary of Defense may make the certifications required by §§1028(a)(1),(b), and (c)(1), or comply with the national security waiver provisions of §1028(d), and thus enable the administration to use funds appropriated by the 2013 NDAA for accomplishing prisoner transfers.

4. Conclusion.

In my opinion, the action described above could and should have been taken long ago. Now is the time for the President to cease making speeches and promises about closing the prison, and instead to act. To paraphrase his campaign slogan, yes he can! With his humanity and courage, he can promptly end this disgrace to our country's reputation!

My brief form of resume is attached.

Respectfully submitted,


Thomas P. Sullivan



A letter from Abdulrahman Suleiman's mother:

Hello,

I am the mother of prisoner Abdul Rahman Abdu, and I have one question I would like to pose to the US Congress, the US Government and US President Obama: "Why have you been holding my son, the apple of my eye, for such a long time, and what is the crime this young man has committed at such a young age?" He was never charged in his life with any crime whatsoever. What kind of law and justice authorize you to imprison my son for such a long time? You have deprived me of my son for twelve long years of injustice. Please have mercy on his weak mother. My heart is torn apart from pain over my beloved son. Aren't you fathers and mothers? Don't you have children? Please, put yourselves in my shoes and put your children in my son's shoes and tell me how would you feel? Would you find peace of mind while your children are in jail? Would you find peace of mind while you have been all these years deprived of the sight of your own children.

Abdul Rahman's father passed away and his only wish before he died was to be reunited with his son Abdul Rahman and to have him back home among his siblings. Before he passed, he had one and only dream and that is to be able to hug his son who has been out of his sight held in prison for a very long time. Does America really want to deprive me of the sight of my son as it did to his father? I will never forgive neither America, nor the Congress and nor President Obama for depriving me of my beloved son, of his sight and of his hugs. They deprived me of seeing him in his wedding attire. I want to see my son Abdul Rahman getting married. I want to enjoy seeing my grandchildren playing in front of me. I want my son Abdul Rahman. I don't want anything else from life. Bring me back my son. You have no right to hold him in jail for all these years, for my son is not a terrorist. My son Abdul Rahman is such a gentle and kind-hearted young man. I can no longer bear living separated from my son. This long separation is killing me. There is not a single day that goes by that I don't remember my son, and I cry because it hurts so much. I miss seeing my beloved son Abdul Rahman so much. This long separation has been hurting everybody here at home. All my sons and daughters constantly remember him with sadness and tears. You have no idea how precious our son is to us. We all love him so much, for he is so much fun to be with, he is so gentle and he has such a good moral character. We miss him so much and we will never find happiness until he is back with us. We pray God to give us the patience we need to bear this situation until he is released hopefully soon; it has been such a long time. When will there come a day when my son is released? When will Americans announce the release of the prisoners? We are all waiting for that day to come and we will never lose hope, for we all rely on God's mercy. Abdul Rahman's family members are appealing to Obama and the Congress to bring us back our son Abdul Rahman so he and his mother could see each other again. And all his siblings want is to have their brother back home so he could bring back joy and happiness. We want to enjoy his wedding day and seeing him living with his family and among his beloved ones. We want him to spend the Holly Ramadan, fast and celebrate the holidays with us. Will this dream come true? Why all this delay and this obstinacy? Please, bring us back our son and don't deprive us of his sight. It is time for you to dissolve this illusion; my son does not pose any threat to the United States of America.

July 18, 2013

We represent Ravil Mingazov who has been detained in Guantanamo since 2002. We won his habeas case in May of 2010, but the government appealed and subsequently filed a motion to vacate the Writ of Habeas Corpus. The appeal has been stayed and the motion to vacate has been pending for more than a year.

In connection with the hearing scheduled for next week we are submitting the attached family correspondence related to our client. Two of the attached letters are from Ravil's son, Yusuf and two are from Ravil's mother, Zukhra. (The letter from Zukhra to Ravil is excerpted.) These letters were written some years ago. The family has indicated that they may be used in connection with the hearing.

Please let us know if you have any questions or if you need further information. Thanks for your attention to this seemingly intractable situation.

Douglas K. Spaulding
ReedSmith LLP

Respected Organizations of Human Rights
and Governments that can Assist
in bringing my Father back to me!!

My name is Yusuf Mingazov and I am 13 years old and I go to school. I have a very important appeal; Give me back my father, Please!! His name is Ravil Mingazov and he is in Guantanamo Bay Prison. I am waiting for him since a very long time, since 2000. I was only a year old when I last saw him. My mother has been telling me all about him since my childhood and I only saw him in a very old family video and he was playing with me. My father is the best in the world, the most kindest person, if you see him and talk to him you will understand what I mean. I feel devastated without him. Please give him back to me, I need him so much.

HELP MY FATHER PLEASE !!!!

I hope that you will not refuse my request and I await your help very anxiously. For me, the most important thing in my life is to get my father back.

With Respect and Proud to be

Yusuf, son of Ravil Mingazov

Letter from Yusuf to the most beloved father,

Assalaamualaikum Warahmatullahi Wabarakaatuh, My Beloved Father,

I miss you so much and I am waiting for you so much and I want to be with you and never be separated from you again. I feel so bad without you and I am jealous of everybody who has a father and I know that you are the best, kindest and the most generous and caring father!! I love you so much!! I beg Allah to make our reunion soon in the state of us being alive and healthy AAmeen!!

My mother told me so much about you and still tells me how you loved me, played with me!! I know you very well now and I feel you so close to me. When me and my mother talk about you, we always end up crying together. Thank you for all your letters, cards and pictures, I treasure them all!!
My Dearest father, I need you very much!!

I am studying well at school and I love to play football. I know how to swim and I like to play computer games. My mother tells me that I am an exact copy of you in all my actions, in my eyes and my smile and looks and habits. We love you and await your return anxiously!! You are so dear to us and we treasure you!! I study the Quran at school and I am particular about my prayers (Salah) and I always remember you in my prayers.
My dearest father I always remember you and I dream of the day we will meet and never be apart again, Aameen !!

Love you very much !! I am kissing your hands and hugging you tight!!

Your Beloved Son

Assalaamualaikum Warahmatullahi Wabarakaatuh

Yusuf Mingazov

Translation from Russian
Letter from Mother

Date: April 25, 2009

Dear President Obama,

Writing to you is Zukhra Valiullina from Russia. My son Ravil Mingazov is currently in Guantanamo. He left Russia to see what life of a Muslim was like in the [Middle] East. His wife Dilyara and two-year old son Yusuf stayed with me. Eventually, they wanted to move to a Muslim country ("Hijr"). [President] Bush's soldiers detained Ravil for no reason at an apartment in Pakistan. For seven years now, he has been kept without charge at Guantanamo. There has been no investigation or trial. His wife and son continued to live with me for another five years and then left for Syria. His wife got re-married there.

I am 72 years old. I live by myself. From all the stress I had to endure, I have developed a heart condition. I am handicapped now. I have effectively lost my son, my beloved daughter-in-law, and my grandson.

These days, when I prepare a yummy meal, I always think about my son – "So, this is what I am having today. What kind of food does my son get in the far and away land where he is?" He never wrote that the things were bad where he is. In fact, he wrote that for Uraza Bairam¹ they were given dates and honey. He also mentioned snow-white bedding and underwear. His letters, however, only come once every 6 – 8 months.

My son has been detained at Guantanamo for seven years now. He has lost his family and is left with no means to support himself. Due to my old age and poor health I cannot wait too long to see my son. During your presidential campaign, you promised to close Guantanamo. I beg you to expedite the review of my son's case. He has not committed any offense against the United States or Russia. He is not a terrorist. Unjustified killing is a great sin, and Allah(God) tells us not to do it.

This is my appeal to you. I used to pray that you become president as soon as possible.

Respectfully,
Zukhra



¹ Period of fasting for Muslims

With Allah's praise I am writing to you, my dear son
 I think of you often, and I cry about you. May Allah give you patience. Be patient, many endured. Prophet Yusuf spent 8 years in confinement. Don't let your heart grow hard towards Allah. This may be your fate. Staying here is even worse. They are afraid of Moslems here, and they put them in jail for no reason. ... The only thing is that I wish Yusuf could grow up knowing his Father. He used to think that when they go there, he would be able to see you, but I said, "No, dear son, your dad is not going to be there yet." Oh well, this life is just a blink compared to the future life. So let's be patient and let's do good things. ...

.....

I will be turning 70 years old soon. Don't waste your time there. Study English, Arabic and read the Koran.

.....

Son, I will be finishing my letter here. Say "salaam" to your friends there. May your life be sustained by the hope that fortune comes after misfortune, with Allah's help. Here bird cherry trees are in bloom, the spring is cold, but we are hoping for the warm weather. All the relatives and friends are saying salaam to you. May Allah help you. Good bye.

LINCOLN SQUARE LEGAL SERVICES, INC.

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Kathy Ho, M.S.W.

July 22, 2013

Senator Dick Durbin
Chairman, U.S. Senate Committee on the Judiciary
Assistant Majority Leader
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Durbin,

I represent Sanad al-Kazimi, a Yemeni national, husband and father of four children. He was disappeared by our government in January of 2003, sent to secret sites and tortured. He has been indefinitely imprisoned at Guantánamo since September of 2004. Mr. al-Kazimi suffers from severe PTSD and major depression, which was diagnosed by a highly qualified psychologist, Dr. Sarah Schoen, who I retained to examine him. Yet, rather than properly diagnosing and treating Mr. al-Kazimi's significant mental health problems, the U.S. military relegated Mr. al-Kazimi to years of solitary confinement that exacerbated his symptoms.

In recent years, upon recommendation by Admiral Walsh, the military curtailed solitary and permitted more communal living and access to news from the outside world, which allowed my client to eat and pray with others and learn of current events in his home country. This alleviated some of my client's suffering. But in the wake of the hunger strike and my client's participation in it, he was moved back into solitary confinement. He suffers greatly from hunger striking and his PTSD symptoms are returning in full force.

As my client wrote to me:

I am in solitary. Outside time is only offered in the middle of the night. The military took everything: television, radio, family's letters, books, lawyer's letters, and clothes. I have only one mat, one blanket and one set of clothes, and the guard provocations are continuous especially at night and during prayer. It is always cold; I can't keep warm.

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We are refusing to see the military's doctors because the military doctors sanctify their uniforms more than their profession. I am deteriorating. We need a humanitarian health organization to send doctors to examine all the men.

Mr. al-Kazimi is *not* one of the 56 Yemenis approved for transfer by President Obama's Task Force. Rather, he was referred for prosecution by the Task Force in 2010, yet has never been charged. Based on recent statements made by the Chief Military Prosecutor, far fewer men will be prosecuted than the Task Force contemplated. Thus, like so many others, Mr. al-Kazimi is by default in the Task Force's "continue detention pursuant to the AUMF" category. But in fact, except for the very few who have actually been charged and face trial, all the men at Guantánamo are in the same quagmire. Whatever their designation by the Obama Task Force, they all remain locked up without a release date.

The administration's recent announcement that it is putting in place yet another detainee review procedure—this time designated Periodic Review Boards—is cause for concern. First, The Obama administration claims to have conducted a thorough review of each man imprisoned at Guantánamo in 2010, yet 86 of those men deemed transferable remain imprisoned. Therefore, the creation of yet another review board is superfluous if President Obama does not follow-through on the assessments of his own administration. Second, while I welcome a fresh and meaningful review for my client, who is now in a purgatory of uncertainty, creation of a new review procedure could signal the administration's intent to maintain the regime of indefinite imprisonment long into the future.

Instead, President Obama and Congress must work toward ending the policy of imprisonment without fair trial. This extraordinary use of power, which should be cautiously reserved for the heat of war, must end.

Though the military insists on calling my client's imprisonment detention, thus distinguishing it from the punitive nature of a sentence, this is Orwellian speak. My client is being punished. His imprisonment has been harrowing, harsh and long-term. The military can call it detention, but it is punishment without charge and fair trial.

My client has chosen to strike—to take some modicum of control over his life. As my client writes:

The resolution of the strike is not complicated. The first step is that men who have their release papers, should be released—let go those who are cleared for release. The second step is that the others should be scheduled for trials—it is a necessity for people here to stand in front of military or civilian courts."

Hunger striking is peaceful protest because it does not harm others. Of course, that is not entirely true, because like all hunger strikes it is designed to harm the reputation of its target. But the target will only be harmed if the cause is just. Why would those with power to remedy

the injustice at Guantánamo feel any pressure if my client's demands were immoral, impossible or unjust. The holder of power can only feel shame if there is reason for shame to be felt.

Indefinite detention without trial is inherently inhumane and the long term duration of my client's detention, without resolution in sight, renders it profoundly cruel.

Respectfully,

A handwritten signature in dark ink, appearing to read "M. Rayner", written in a cursive style.

Martha Rayner
Associate Clinical Professor of Law

STATEMENT

DATE July 22, 2013

TO Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights
for the July 24, 2013 hearing titled "Closing Guantanamo: The National Security,
Fiscal, and Human Rights Implications"

FROM Joseph K. Hetrick, Esq.

SUBJ Statement on behalf of Mohammad Zahir, ISN No. 1103

My client and I had one thing in common: we each believed in the promise of America.

"I was happy when I learned that the Americans were coming to Afghanistan," he told me in the steamy plywood conference room at Guantanamo years ago. "My people had fought the Russians because we had to. The Russians had no respect for human rights and had ignored all laws of war and peace. I knew things would be different when the Americans arrived. America recognized the Rule of Law and had written all basic human rights into its founding documents." He knew the facts. He had been a school teacher in his home village. His mistake, his only "crime," was to allow girls to attend his school and to teach a few secular subjects such as mathematics and science. The zealots in his village condemned him for these decisions. Ironically, they gave him the derisive nickname of "The American" for his progressive views.

They did not forget. When the opportunity came, they accused him of being Taliban, exacted their revenge, and collected a reward. My client was seized at his home without resistance in the early hours before morning prayer. His house was ransacked, all possessions seized, and his family left broken and without support. He was whisked away to Bagram, beaten with electrical cables, and, hooded and disoriented, flown to Guantanamo.

Over a decade later he is still there. He has had no hearing and has never been charged with a crime. Perhaps most cruelly, several years ago he was told that he was cleared for repatriation to Afghanistan. His return, I was told, was "not inconsistent with the foreign policy of The United States." Yet still he sits in his cell. He, too, is broken. He is depressed, extremely frail, and is in pain from various physical ailments. Psychologically and emotionally he is much, much worse. He has been stripped of all hope. All the time knowing he has done nothing wrong.

Throughout the years, his story never changes. It has been supported by his family, friends, and his whole village. It is now presumably recognized by our government through his clearance for repatriation. Yet he remains in Guantanamo uncharged and without a hearing. In one of our meetings he stopped mid-thought and looked down at his feet. As always, they were chained together with metal links running through a large bolt sunk deep into the concrete floor. "In my village," he said to no one in particular, "we would not keep a goat chained up like this."

At that moment, I believe we shared the same thought: America had let us down. This was not the America in which I was raised and in which I believed, and it was certainly not the one my client had hoped for.

This must change. Indefinite detention in these circumstances is simply wrong. It violates the bedrock principles of our Republic and is contrary to the Law of Nations. You have the power to end this blot on our national character and beliefs. The war on terror cannot be won by holding innocent people for more than ten years. Today the prison at Guantanamo stands only as a reminder of a flawed attempt to solve a very difficult problem and as a powerful recruiting tool for those zealots responsible for the root cause. The prison at Guantanamo needs to be closed. Those detainees whom our own government has cleared for release, like my client, must be returned to their families and allowed to resume a peaceful life.

The problems identified above are compounded by the fact that our meetings have grown less frequent because of the interference of our government. Mail from me is often not received. When it is received, agreed upon meetings often fail at Guantanamo because of newly imposed requirements for searching his private parts before allowing him to meet with counsel, or, because on the day of the meeting there is no government translator available to tell him I have come, resulting in complete confusion and denial of his right to meet with counsel.

STATEMENT FOR THE RECORD

TO: Hon. Senator Dick Durbin, Chairman, and Hon. Members of the Senate
Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

FROM: Beth D. Jacob, Shelley L. Merkin, Barbara A. Miller, Lisa A. Natter, Brian J. Neff

DATE: July 18, 2013

The attorneys named above have for a number of years been providing pro bono legal representation to men imprisoned at Guantanamo. One of our clients, Mohammed al-Zarnouqi, has been imprisoned there since 2002. Mohammed was cleared for release by the Obama Administration in 2009 – yet three years later he remains a prisoner, with little hope of getting home to Yemen (or any other country that will have him) any time soon.

Mohammed is participating in the hunger strike, and has also been protesting by sitting down when ordered to return to his cell after his (infrequent) visits to the recreation area or shower. His protests have made him a target of the “IRF” (Initial Reaction Force) Team -- guards dressed in riot gear who “subdue” non-compliant prisoners. We recently received a letter from Mohammed describing an experience of being IRF’d, and expressing his thoughts on the continuing injustice at Guantanamo. We provide for the Subcommittee’s consideration the following excerpts (translated from Arabic) from Mohammed’s letter.

Thank you for considering this information.

From Mohammed Al-Zarnouqi to the attorneys . . .

....

For your information, when the IRF team came to me, they turned me on my stomach, tied my feet and then tied my hands behind my back then lifted me up and turned me to my right side and pressed their bodies against my back and chest until I seemed to hear the cracking of my bones and my spine. I was unable to breathe. I was able to talk to the interpreter with difficulty. They took me to the cell and threw me on the ground on my stomach with my head in the toilet (as shown in the sketch I sent you). I am suffering from pains in my chest, back and knees with difficulty getting out of my bed because of the pains. I wonder when this injustice will stop. Are they planning to let me out of here with broken and disabled parts of my body - on a wheelchair?

....

Isn’t the fact that the IRF team assaults me and hurts me while I am peacefully protesting a violation of the international law? Isn’t it true that the international laws allow me to protest in a peaceful manner? Watch the recorded videos they recorded showing me while sitting and telling them I am protesting peacefully as a result of first, insulting the Quran and second, I want back my freedom. Why am I here

when I have a paper saying that I am eligible for transfer since 2009? Why don't you send me back to my country? If there is a problem in my country, send me to a third country -- any country.

They bring the IRF team, assault me and hurt me and above all of this, they punish me. In what right they do this? They don't have any reason to punish me. I have never assaulted or hurt anyone.

Aren't there numerous peaceful protests happening in many countries these days? The American government claims that it is the sponsor of peace and democracy. Are Guantanamo detainees outside this world -- not on the map and have no right in sit-ins and protests? . . .

I wonder if this letter will be read by open minds from honest people who do not accept injustice, or would this letter and my past letters be read to dead people who are emotionless?

Finally, I would like to say, there is an end to every oppressor. Days and years will pass and we might forget what happened in Guantanamo but history will not forget and all what happened in Guantanamo will be recorded in the black pages of history. All the details of how we were treated, how the courts ignored our rights and were unable to see our innocence will be there. We didn't do anything wrong to be treated this way. The new generations of Americans will inherit this guilt of injustice inflicted on innocent people.

. . . .

I hope this letter finds some reaction in the hearts of good and honest people who do not accept injustice and hate oppressors.

I, the oppressed detainee, wrote this letter and the past letters to say:

If my body is lost in the dust,

And my name is dropped from the minds,

My writing is here to stay

For the generations to read *(end of the short poem)*

[End of this letter and hope it reaches you quickly]

[A prisoner but still alive -- from the heart I do write]

The Oppressed Detainee

Mohammed Al-Zarnouqi

ISN # 691

Date this letter was sent

Monday 6/17/2013 Corresponding to 8/8/1434



American-Arab Anti-Discrimination Committee

Statement for The Record
on behalf of
The American-Arab Anti-Discrimination Committee (ADC)
Before
U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and
Human Rights

The American-Arab Anti-Discrimination Committee (ADC) appreciates the opportunity to provide a statement for the record concerning the July 22, 2013 hearing scheduled by the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. ADC commends the "Closing Guantanamo" hearing and the renewed push to finally close the Guantanamo Bay detention facility. As key stakeholders and community partners, ADC welcomes the decision of the Committee to revisit this issue and is pleased to see it once again become a priority.

ADC is the country's largest Arab American organization. It is a non-profit, non-sectarian, non-partisan, membership-based organization, which has protected the Arab-American community for over thirty years against defamation, discrimination, racism, and stereotyping. ADC was established in 1980 by former US Senator James Abourezk and has grown into a national organization with headquarters in Washington, DC. ADC coordinates its efforts closely with United States federal, state, and local government agencies in facilitating open-lines of communication with the Arab-American community.

Shortly after his inauguration in January 2009, President Obama signed an executive order to close Guantanamo Bay within one year. Over five years later, the prison remains open due to partisan gridlock. This year, President Obama recommitted to finally closing Guantanamo in his May 23rd national security speech at the National Defense University stating, "There is no justification beyond politics for Congress to prevent us from closing a facility that should have never been open." We cannot let the effort to close Guantanamo falter again. Guantanamo Bay should have been closed long ago. With all the legal and ethical problems it continues to pose, Guantanamo is a black mark on this great nation that must finally be wiped away.

According to the ACLU, since it was opened in 2002, the Guantanamo Bay detention facility has held approximately 779 prisoners over the course of its operation. Over the years, 604 prisoners were eventually released and 9 died while still at the facility, leaving 166 at the prison today. Of this number, 86 prisoners have been cleared for release but are still being detained. The U.S. Government says that it does not have enough evidence to prosecute 46 of the prisoners, but will not release them because they are "too dangerous." Twenty-one (21) of these prisoners are children, the youngest of which is aged 13. The oldest prisoner is 98. Reuters, CNN, and other news agencies reported in May 2013 that according to Pentagon estimates, it costs roughly \$150 million per year to run the detention facility and military tribunal system. This means that each of these 166 inmates costs the U.S. roughly \$900,000 per year. There is no reason the U.S. Should continue to spend such absurd sums of money on such a legally unsound and ethically dubious facility.



With respect to the legal concerns, the remaining prisoners at Guantanamo Bay are being held without any due process. Some have not been charged with a crime; and, many have even been cleared for release by the U.S. Government, yet they remain in the prison. Additionally, the military tribunal system that is used at Guantanamo Bay has not even been very effective. Only seven (7) prisoners have been convicted through military tribunals at Guantanamo Bay, as opposed to the over 500 terrorism suspects who have been convicted in federal courts since 9/11. Guantanamo Bay not only makes a mockery of our legal system, it does so while simultaneously being the most ineffective means of prosecuting terrorism suspects.

Guantanamo Bay also poses serious ethical concerns. In April 2013 the Constitution Project's Task Force on Detainee Treatment released a report that ultimately concluded that "it is indisputable that the United States engaged in the practice of torture." The report details how many of the interrogation techniques at Guantanamo Bay are considered torture and how many others, while not satisfying the criteria for torture, still involved "cruel, inhumane or demeaning" treatment. Although Obama may have called for an end to outright torture at Guantanamo Bay, the treatment of prisoners at the facility is still reprehensible. Many of the prisoners are held in what is effectively solitary confinement for 22 hours each day. These prisoners are also forced to live with the fact that they have no idea when they will be released, despite the fact that 86 of them were cleared to be released years ago. The prisoners' situation is so desperate that it has led many of them to once again go on a hunger strike this year. This hunger strike has brought yet another human rights abuse at Guantanamo to the nation's attention: forced feedings.

Forced feeding of prisoners, which has been described by many as "torture," is a brutal, humiliating process that deprives the prisoners of any sense of dignity. Judge Gladys Kessler of the United States District Court for the District of Columbia agreed, referring to it as "a painful, humiliating, and degrading process." One detainee at the facility, Samir Naji al Hasan Moqbel, when describing the process of the feeding tube being placed in asserted the following, "As it was thrust in, it made me feel like throwing up. I wanted to vomit, but I couldn't. There was agony in my chest, throat and stomach. I had never experienced such pain before. I would not wish this cruel punishment upon anyone." Such brutal tactics are particularly horrifying during the month of Ramadan, when many Muslim prisoners are fasting. What is supposed to be a time for prayer and reflection has become a time of agony for these men, many of whom, it must be emphasized, have either been cleared for release or not charged with any crime.

ADC thoroughly believes that it is time to once and for all close the Guantanamo Bay detention facility. It is a travesty that such a costly, unethical, and illegal facility has remained open simply because of partisan gridlock. Guantanamo Bay has come to be a symbol of America's failure to live up to its own ideals. The longer Guantanamo Bay remains open, the longer it discredits our nation in the eyes of the world. ADC thus urges both Democrats and Republicans in Congress to come together and finally close the Guantanamo Bay detention camp.

Respectfully Submitted,


Abed Ayoub, Esq.

On behalf of the American-Arab Anti-Discrimination Committee (ADC)



**Written Statement of the
Council on American-Islamic Relations**

On

**Closing Guantánamo: The National Security, Fiscal, and Human
Rights Implications**

Submitted to the

**United States Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights**

July 24, 2013

Testimony Prepared by: Robert S. McCaw
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CAIR is America's largest Muslim civil liberties and advocacy organization. Its mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding.

Introduction

Chairman Durbin, Ranking Member Cruz, and other distinguished committee members of the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, the Council on American Islamic-Relations (CAIR), the nation's largest Muslim civil liberties and advocacy organization, appreciates the committee's examination of the implications of closing the Guantánamo Bay detention facility and respectfully submits this written testimony for your consideration.

The State of Guantánamo

CAIR's position on the U.S. prison camp at Guantánamo Bay, Cuba is clear: CAIR strongly opposes the indefinite detention without charge or trial of prisoners at Guantánamo. CAIR calls for the immediate release or civilian trial of all remaining detainees. Likewise, CAIR cautions against the closure of Guantánamo being accomplished by creating a comparable facility with the same inadequate judicial processes inside the United States.

In May, CAIR welcomed with cautious optimism President Obama's speech at the National Defense University in which he expressed opposition to "boundless global war" as a pillar of American foreign policy and renewed his push to close the U.S. detention camp at Guantánamo. As the president said, Guantánamo has become a "symbol around the world for an America that flouts the rule of law."

CAIR believes that the administration's recommitment to closing the prison at Guantánamo is driven in part by the prisoners' four-month-long hunger strike in protest of their unconstitutional indefinite detention. While the hunger strike may have started in February over allegations of guards mishandling inmates' Qurans, after being detained for 11 years without charge or trial, many of the detainees are willing to risk death just to draw attention to their indefinite detention status.

At present, 96 of the 166 detainees are being force-fed through nasal tubes by military doctors. The process of force-feeding is fundamentally cruel, inhuman, degrading, and torturous. Force-feeding also carries the risk of major infections, possible death, and psychological suffering.

The World Medical Association (WMA) Declaration of Malta on Hunger Strikers states, "[F]orcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment." The American Medical Association, a member of WMA, and the International Committee of the Red Cross have similar positions on force-feeding.

This force-feeding calls attention to the fact that our nation which prides itself on rule of law and due process continues to indefinitely detain prisoners in Guantánamo Bay. This situation continues to harm our nation's moral authority in international affairs.

When President Obama first took office, CAIR welcomed his pledge to close the prison at Guantánamo within a year. Five years later, CAIR is less optimistic after Congress has

repeatedly blocked the president's efforts to transfer and prosecute detainees or close the prison camp.

After twice failing to make good on his threats to veto the National Defense Authorization Acts of 2012 and 2013, President Obama has signed into law a number of restrictive provisions that have checked his own ability to transfer or prosecute detainees or close the prison. While 86 prisoners were approved for release by the U.S. government's Guantánamo Review Task Force in 2009, none have been cleared for transfer because of these obstructive provisions.

Until recently, closing the detention facility no longer seemed to be a priority of the administration, a reality that likely has contributed to the current hunger-strike.

In response to mounting public and international pressure, in May, President Obama committed to lifting his own self-imposed three year ban on transferring Guantánamo detainees to Yemen, a result of the country's improved security and stability. The countries of Afghanistan, Egypt, Kuwait, Saudi Arabia, Tunisia, and Yemen remain active in their diplomatic efforts requesting the United States to turn over their nationals.

This spring the United States transferred control of more than 3,000 prisoners held in Bagram to the Karzai government as part of its strategy to shift security operations to Afghanistan and draw down combat presence. Despite that, 17 Afghan detainees reside in custody at Guantánamo while the U.S. remains indecisive over how to transfer prisoners which it has determined pose similar or no security risks.

The administration has also directed all agencies involved in Periodic Review Boards (PRBs) to resolve all remaining issues and begin inmate evaluations to determine whether individual prisoners pose a real threat to national security. These reviews are more than a year overdue.

The administration contends that PRBs are necessary because many of the prisoners held at Guantánamo cannot be put on trial due to a lack of evidence or evidence was gathered through secret intelligence or illegally by harsh interrogation methods or torture. Of the 166 detainees, 48 are classified by the administration as being indefinitely detained without trial because of a lack of sufficient or admissible evidence.

In June, the president also reopened the State Department's Office of Guantánamo Closure, which had been closed since January, and has committed to appointing a similar envoy at the Pentagon as well. These two offices will be tasked with liaising between Congress and the administration to build consensus on how best to close the facility.

The State of Congress

In March, the U.S. House of Representatives passed the National Defense Authorization Act for Fiscal Year 2014 (H.R. 1960) by a vote of 315 to 108. Once again, while considering this annual defense appropriation act, representatives incorporated several provisions that would impede efforts to close Guantánamo while rejecting more constructive amendments.

Specifically, CAIR expresses serious concern over the adoption of Representative Jackie Walorski's (R-IN) Amendment Number 19 (225 Republicans in favor, 183 Democrats against) that prohibits the Secretary of Defense from using any funds authorized to the department for the transfer or release of Guantánamo detainees to Yemen.

CAIR also remains disappointed over the House's rejection of Representative Adam Smith's (D-WA) Amendment Number 20 (172 Democrats in favor, 228 Republicans against), which would have provided a deadline for closing the detention facility at Guantánamo by December 1, 2014.

While there is still hope that the Senate will adopt measures that support the closure of the prison at Guantánamo, critical opposition remains. However, CAIR anticipates that the discourse and written testimony submitted to this hearing will bring about compromise and an end to such opposition.

Recommendations

- CAIR urges the immediate release or civilian trial of all remaining detainees. Congress and the president should work together to address the issues of indefinite detention and the prison at Guantánamo Bay, which challenge our nation's commitment to the rule of law and worsens our international reputation.
- CAIR requests that the 86 prisoners already cleared for release be transferred to their home countries or other countries for resettlement without delay. In doing so, the administration should be allowed to work with the countries of Afghanistan, Egypt, Kuwait, Saudi Arabia, Tunisia, and Yemen without restrictions imposed by Congress.
- Should the administration proceed with PRBs, CAIR encourages appropriate steps to be taken to ensure the PRBs have the required processes in place for meaningful review of a prisoner's detention status at Guantánamo.
- CAIR also urges the U.S. to implement the immediate and permanent cessation of all force-feeding of Guantánamo prisoners and that an independent medical professional team review and monitor all hunger-striking prisoners. CAIR also requests an investigation and rectification of any abusive conditions or treatment at Guantánamo in addition to force-feeding.
- In addition to considering national security and due process concerns, CAIR recommends that Congress fully consider the credible financial justifications for closing the prison at Guantánamo Bay. As clarified by U.S. House Armed Services Committee Ranking Member Adam Smith, as a nation we are "currently spending approximately \$1.6 million per detainee each year at Guantánamo Bay, compared to \$34,046 per inmate at a High Security Federal Prison."

Statement for the Record of

Gerald E. Thomson, M.D.

Submitted to the Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights in Connection with the July 24, 2013 Hearing Titled "Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications."

July 22, 2013

I am Dr. Gerald Thomson, Lambert and Sonneborn Professor of Medicine Emeritus and former Senior Associate Dean at Columbia University. I am a past President of the American College of Physicians, a former Chairman of the American Board of Internal Medicine, a member of the Institute of Medicine of the National Academies and a former member of the Board of Directors of the Physicians for Human Rights.

I was a member of The Constitution Project Task Force on Detainee Treatment which issued its Report on April 16, 2013.

I offer the following perspectives on the current hunger strikes at Guantanamo.

It is fair to say that the intensified concern about Guantanamo has been caused by hunger strikes. The hunger strikes are important to the detention center and the government as they are confronted with a protest that is dangerous for the detainees, potentially successful in its demands, and highly controversial in the way the hunger strikes have been managed. The risks to the detainees are obvious as they use their bodies and risk their lives in protest. Widespread interest, scrutiny and criticism add to the situation.

Much has been learned from past hunger strikes over many years. There is considerable medical literature and there are medical ethical principles and guidance. For the situation at Guantanamo, it is important to understand the concepts and issues involved.

Based on the medical course of prolonged fasting, hunger strikes have been defined as total fasting, except for the ingestion of water, for more than 72 hours by an individual who is mentally competent and not suicidal. Total fasting without water would result in death within several days. Total fasting with water may go on for weeks and months without immediate risk of permanent injury or death, depending on the whether supplemental nutrients like vitamins and small amounts of sugar are taken in the water. Hunger strikes are almost always demonstrations for a cause, often against confinement or conditions of confinement. They are not intended to be suicidal.

There is no reason to believe that these factors and expectations are different for the Guantanamo detainees.

In 1975, the World Medical Association (WMA) issued a statement prohibiting artificial feeding in prisoners who refuse nourishment. The American Medical Association, the U.S. representative organization to the WMA, endorsed the Declaration and later reiterated specific support for the provision prohibiting forced feeding.

In 2006, the WMA clarified and extended the principles including the statement that "Hunger strikers should not be forcibly given treatment they refuse" and added guidelines for the management of hunger strikes including: "Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment."

The WMA principles and guidance have been accepted as the core of medical ethical guidance on the management of hunger strikes.

Management of hunger strikes derived from the WMA guidelines include the following as described in the Report of the Constitution Project Task Force on Detainee Treatment. "The involvement of physicians is essential for the management of hunger strikes. Their roles include: recognition and diagnosis of the hunger strike; assessment of the competence of the individual, whether the individual is suicidal, or whether there is pressure or coercion from other detainees involved; informing and advising the hunger striker regarding expected medical developments and outcomes and making decisions about management; treating and dealing with medical issues during the course of the fast; managing periods of refeeding after fasting; and dealing with medical crises and terminal, end-of-life situations. The physician should be involved as the hunger striker's physician, in a trusted, physician-patient relationship with the individual's medical interest held as paramount."

Management of hunger strikes at Guantanamo has differed from what is described as ideal. An important, fundamental difference is the indication that hunger strikers are suicidal and they must be saved by forced feeding. Hunger striking detainees are not likely to be suicidal. Indeed, one of the primary initial tasks of physicians managing hunger strikes is the determination of mental competence and whether the individual is suicidal. Those who are suicidal should be removed from management as hunger strikers and treated as suicidal patients.

Forced feeding is medically uncalled for and against established ethical principles. The process as practiced at Guantanamo is described by the most recent, March 5, 2013, "Standard Operating Procedure on Medical Management of Detainees on Hunger Strike"(SOP) from the Joint Task Force, Guantanamo Bay, Cuba. The process includes the forced restraint of the detainee's arms, legs and torso in a specially made restraint chair followed by the forced passage of a tube through the nose into the stomach, the injection of liquid food into the stomach and a period of continued restraint in the chair after the feeding. This is done twice

daily. The procedure is assaultive, highly abusive, painful and degrading, constituting cruel, inhuman and degrading treatment and, in the opinions of many, torture.

The Department of Defense position that forced feeding at Guantanamo is based on policies and practices dealing with hunger strikes in the U.S. Federal Bureau of Prisons (BOP) is not accurate. Although the BOP protocol calls for involuntary feeding, there is no indication that restraints or restraint chairs are routinely used. Further, a sentencing judge is notified and given the reasons for the involuntary feeding and the procedures are videotaped.

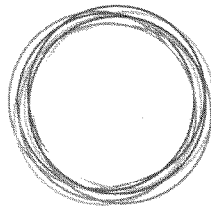
Despite knowledge of and acknowledgement by the Department of Defense that hunger strikes are taking place, it has been difficult to fully understand what is going on. Information indicated that, after five months of hunger striking, 100 detainees were striking, 45 of those were being force fed, and approximately 10 were hospitalized (recent reports from the Department of Defense claim that the first and third categories have decreased, but that is difficult to verify and much confusion remains). The number being force fed in relation to the total on strike suggests that some are partial or intermittent fasters.

Transparency is an important issue. From 2001 – 2004, what was happening at Guantanamo was largely secret. We did not know what was happening until late 2004 -2005. Currently it is known that there is a prolonged hunger strike and that most detainees are involved. The SOP is known and contains policies and practices considered to be unethical and cruel inhuman and degrading treatment. Thus the problems, including mistreatment of detainees are publically known. The absence of clarity, truth, and if necessary accountability makes us all potentially complicit. It cannot be said that we did not know or suspect.

There is little question that the hunger strikes are linked to indefinite detention and a sense of hopelessness. It was hoped that the announcements of renewed government attention and action that would deal with the transfers of detainees out of Guantanamo and ultimately its closing would have an impact, but they did not. Tangible action and results are needed.

In the meantime, those continuing their hunger strikes should be managed in keeping with proper medical care and medical ethical principles and practices – and the public should know what is going on.

The situation and all involved deserve no less.



The
CENTER for
VICTIMS of
TORTURE

**Testimony to the Senate Judiciary Subcommittee
on the Constitution, Civil Rights, and Human Rights:**
*Closing Guantanamo: The National Security, Fiscal, and Human Rights
Implications*

Curt Goering, Executive Director
The Center for Victims of Torture
July 24, 2013

Testimony to Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications

Curt Goering, Executive Director

The Center for Victims of Torture

July 24, 2013

The Center for Victims of Torture (CVT) commends Chairman Dick Durbin (D-IL) and Ranking Member Ted Cruz (R-TX) for holding this hearing on “Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications.”

CVT is an international non-profit organization that provides treatment and rehabilitation services to torture and war trauma survivors in the U.S. and abroad. Founded in Minnesota in 1985, CVT was the first organized program of care and rehabilitation for torture survivors in the U.S. and one of the very first in the world. To date, we have extended care to nearly 24,000 survivors of torture and war trauma at our healing sites in Minnesota, Africa and the Middle East.

CVT opposes indefinite detention, which we define as detention without trial for an undefined duration over which the individual has no knowledge of when or whether he will be released. From our 27 years of experience healing torture survivors, we know indefinite detention causes such severe, prolonged and harmful health and mental health problems for those detained that it can constitute cruel, inhuman, and degrading treatment. Among the thousands of survivors CVT cares for are many who have suffered while being imprisoned without charge or trial and without being told when, if ever, they might be released.

CVT supports a safe environment where detainees held in U.S. custody are treated humanely in accordance with U.S. laws and obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR) and other international human rights standards. As such, we remain deeply concerned with the continued indefinite detention of most of the 166 detainees held at the prison in Guantanamo Bay, Cuba and the ongoing hunger strike among a large percentage of those detainees.

Consequences of Indefinite Detention

The very indeterminacy of indefinite detention, without charge or process for review and eventual determinate sentence or release, creates a degree of uncertainty, unpredictability and loss of control over the elemental aspects of one’s life, causing severe harm in healthy individuals, independent of other aspects or conditions of detention. For these reasons, the physical and psychological ramifications of indefinite detention rise to the level of cruel, inhuman, and degrading treatment (CID), a violation of U.S. treaty obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and in contravention of U.S. constitutional law.

- ***Physical and Psychiatric Trauma Resulting from Indefinite Detention***

“Cruel, inhuman, or degrading” is not merely a value-laden set of words - measurable physical and psychiatric trauma result from CID. Medical examinations have disclosed that indefinite detention have

led to profound depression and vegetative symptoms, with all the attendant degradation of multiple aspects of health. The harmful psychological and physical effects of indefinite detention include:

- Severe and chronic anxiety and dread;
- Pathological levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well as on the central nervous system;
- Depression and suicide;
- Post-traumatic stress disorder (PTSD); and
- Enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release.¹

These severe disorders arise because the indefinitely detained prisoner realizes that nothing he does matters and that there is no way to end, foreshorten or even know the duration of his incarceration. A 2008 study² in which former detainees from Abu Ghraib and Guantanamo underwent detailed medical and mental health evaluations found that uncertainty was one of the most stressful factors among detainees ultimately released without ever having been charged. This uncertainty resulted in tremendous anxiety, numbing and disconnecting from feelings of hope.

Many of our clients who were imprisoned without trial or charge speak of the absolute despair they felt, never knowing if their detention would come to an end. CVT clinicians who work with survivors of torture that have been indefinitely detained tell us that with no defined end, clients feel there is no guarantee there will ever be an end. This creates severe, chronic emotional distress: hopelessness, debilitation, uncertainty, and powerlessness.

These effects are exacerbated in detainees who have been traumatized or tortured prior to commencement of indefinite detention. Again, our experience tells us that the lack of control and having no sense of what will happen next re-stimulates the kinds of experiences detainees had while being tortured.

Moreover, indefinite detention affects individuals beyond the detainee himself. When a loved one is indefinitely detained, families are separated; parents, spouses and children can and have suffered similar feelings of uncertainty, unpredictability and uncontrollability leading to the physical and psychological effects described above.

• ***Indefinite Detention Undermines U.S. Foreign Policy, Security and Commitment to Rule of Law***

The United States, as a democratic society that respects the rule of law, has an interest in abiding by its legal obligation under both international and domestic law to uphold human rights standards, including prohibitions against cruel, inhuman or degrading treatment or punishment. The use of indefinite detention – either as an outgrowth of war or as a preventative measure – undermines the U.S.’s commitment to the rule of law.

¹ Physicians for Human Rights, “Punishment Before Justice: Indefinite Detention in the U.S.,” https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf

² Physicians for Human Rights, “Broken Laws, Broken Lives: Medical Evidence of Torture by the U.S. Personnel and Its Impact,” <http://physiciansforhumanrights.org/library/reports/broken-laws-torture-report-2008.html>.

In either times of war or peace, there is no legitimate basis in international humanitarian or human rights law for the prolonged, indefinite detention of individuals without charge or trial. In conflicts between states, detention of prisoners of war and civilians who pose an imperative security risk must be released or repatriated at the end of hostilities, or prosecuted for war crimes. In armed conflicts between states and non-state armed groups, persons detained for engaging in rebel activity may be detained and prosecuted pursuant to domestic laws, but are still afforded due process rights provided by international human rights law, most notably the ICCPR. Persons captured outside of an armed conflict may be detained and prosecuted for criminal conduct according to domestic and international human rights law.

The Fifth Amendment to the U.S. Constitution provides that “No person shall be... deprived of ... liberty... without due process of law.” Likewise, the ICCPR, to which the United States is a party, provides for prohibitions against arbitrary detention, requiring that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”³

The continued indefinite detention of individuals at Guantanamo – some of whom have been held over 11 years without being charged or tried – is inconsistent with U.S. treaty obligations and constitutional principles.

Indefinite detention without charge or trial also has moral consequences for the United States. Not only does such a scheme run antithetical to U.S. values, but it also runs contrary to U.S. foreign policy and national security interests.

The United States needs to engage the international community on many complex issues requiring multilateral cooperation. U.S. leadership to promote and protect human rights encourages political, military, and intelligence cooperation from our allies. By contrast, U.S. engagement in practices such as indefinite detention discourages cooperation from allies and international partners critical to furthering interests abroad.

Furthermore, when the U.S. government violates its international legal obligations in the name of national security, it provides justifications for other governments and oppressive regimes to do the same against innocent civilians, journalists, democracy activists, people seeking to practice their own religion, and even puts U.S. troops in danger.

Hunger Strikes & Force Feeding

The recent hunger strike among the detainees at Guantanamo underscores the despair among detainees facing indefinite detention. Hunger strikes are a form of expression by individuals who have no other way of making their demands known. CVT takes the position that forced feeding of mentally competent hunger strikers is a breach of various bans on torture and other cruel, inhuman or degrading treatment or punishment.

Prison hunger strikes have occurred in democratic and totalitarian regimes around the world for hundreds of years. Prisoners in indefinite detention, at risk of torture, or who are held in other extreme

³ International Covenant on Civil and Political Rights, Article 9(4), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 371.

conditions have resorted to hunger strikes or fasts to death as a way to publicize and create conditions for negotiations of grievances. Prison hunger strikes are often organized or understood as a form of political protest. Notable strikes have occurred during the course of civil and human rights struggles.

The World Medical Association, an international congress of 102 national medical associations, has adopted two documents that address the treatment of prisoners who are on hunger strikes. Specifically, the World Medical Association's 1975 Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment states in part:

Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner.

Additionally, the World Medical Association's 1991 Declaration of Malta on Hunger Strikers provides in part:

Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment.

The International Committee of the Red Cross endorses these World Medical Association statements as does the American Medical Association.

Recommendations

CVT supports a safe environment where detainees held in American custody are treated humanely in accordance with U.S. laws and obligations under the Convention Against Torture, the Geneva Conventions and other international human rights standards. We were pleased to hear President Obama's recommitment to closing Guantanamo during his May 23rd national security speech, and we commend the Subcommittee for holding this hearing.

- CVT urges the U.S. government to put an end to the indefinite detention scheme at Guantanamo by either charging detainees with a recognizable criminal offence and trying them in a court which meets international standards for a fair trial or releasing them. To accomplish this, **the President** should begin transferring cleared detainees to foreign countries using his existing security waiver authority, and **Congress** should pass the Senate Armed Services Committee's version of the National Defense Authorization Act for fiscal year 2014, which includes provisions ending or lowering barriers on transferring all detainees from Guantanamo.
- CVT also urges the U.S. government to follow the World Medical Association's Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (Declaration of Tokyo) and the World Medical Association's Declaration of Malta on Hunger Strikers and its accompanying Guidelines for the

Management of Hunger Strikers. To this end, the *Secretary of Defense* should order the immediate end of all force-feeding of Guantanamo prisoners who are competent and capable of forming a rational judgment as to the consequences of refusing food. He should also allow independent medical professionals to review and monitor the status of hunger-striking prisoners in a manner consistent with international ethical standards.



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FRIENDS COMMITTEE ON NATIONAL LEGISLATION

... a Quaker lobby in the public interest

Written testimony for “Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications” Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

July 25, 2013

Submitted by Diane Randall, Executive Secretary, Friends Committee on National Legislation

Senator Durbin and Members of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights:

Thank you for holding this hearing and for the opportunity to submit written testimony on this important topic regarding Closing Guantanamo.

The Friends Committee on National Legislation (FCNL) fully supports closing Guantanamo as expeditiously as possible on moral and ethical grounds. FCNL is a Quaker lobby in the public interest. We believe that the continued existence of this detention center undermines our strength as a country. Our country's essential foundation—the US Constitution—is premised on the rule of law and protection of human rights. Guantanamo violates both of these cherished ideals. Our adherence to international law and its principles are what give us standing in the world.

As I wrote in my [recent op-ed in the Washington Post](#), this abrogation of our country's values harms us in our efforts to engage other countries to foster democracy. As long as we continue to let the wound of indefinite detention fester, we harm ourselves and jeopardize our national security. Our inability to rectify our own errors of the past only perpetuates the wound.

The continued indefinite detention of the 161 detainees in Guantanamo undermines a moral voice the United States has in the world. Eighty-six of these detainees have been approved for release. An immediate first step would be to return these individuals to their homes as soon as possible. Another 46 detainees who have not been charged or tried are lingering indefinitely with their fates unclear, in a limbo that must be resolved. Eighty-one detainees have used the resources available to them—hunger strikes—to protest their unlawful detention, and our response has been to force feed them. This action not only violates the hunger strikers' dignity, it is a further example of violating these individuals' human rights.

Whatever legitimate anger Americans harbored toward those who perpetrated the ghastly attack on our country in 2001 cannot be fairly assigned to those captives at Guantanamo. This “transfer” of blame does not bring justice to the crime, rather our government is perpetuating injustice.

We urge Congress to use your powers to end this unjust indefinite detention and close Guantanamo Bay Prison.

**Hearing Before the Senate Judiciary Subcommittee on
the
Constitution, Civil Rights, and Human Rights**

Statement submitted by CODEPINK: Women For Peace

July 16h, 2013

Our organization, CODEPINK, recently returned from a delegation to Yemen, where we met with many family members who have loved ones in Guantanamo. We also met with government officials, from the Prime Minister to the Minister of Human Rights. We spent time at the National Dialogue Conference with 565 delegates from around the country. Universally, we found that the Yemeni people are upset that Yemeni prisoners, particularly the 56 already cleared for release, have not been sent home.

Most of the Guantanamo detainees (91 out of 166) are from Yemen. President Obama had banned the release of Yemeni prisoners in 2010 after a man trained by militants in Yemen attempted to blow up a U.S.-bound plane in 2009 with a bomb concealed in his underwear.

In his May speech, President Obama announced that he was lifting this self-imposed ban. Congress immediately tried to block the President by passing an amendment to the National Defense Authorization Bill (NDAA) on June 14

that prohibits using Defense Department funds to transfer detainees to Yemen for one year. The amendment, sponsored by Rep. Jackie Walorski (R-Indiana), passed 236 to 188. The resolution says: “None of the amounts authorized to be available to the department of defense may be used to transfer, release, or assist in the transfer or release, during the period beginning on the date of enactment of this act and ending on December 31, 2014, any individual detained at Guantanamo (as such term is defined in section 1033 (f) (2)) to the custody or control of the republic of Yemen or any entity within Yemen.”

We were in Yemen when House Resolution 1960 passed, and we felt the immediate outrage. “This resolution simply tells the Yemeni people—in a very condescending way—that Yemeni life is of no value,” said Nadia Sakaff, a prominent member of the National Dialogue Conference. Thanks to Ms. Sakaff, hundreds of delegates to the National Dialogue Conference signed a letter denouncing the resolution and calling on Congress and the Administration to repatriate the Yemeni prisoners cleared for release.

Fortunately, HR 1960 is not law, since it has not been passed by the Senate and we are thankful that some members of the Senate are trying to ease the way for the President to close the prison. We hope the full Senate will pass the provisions inserted in the 2014 NDAA by the Senate Armed Services Committee that would allow the Pentagon to send detainees to the United States for medical treatment, sustained detention, and prosecution.

We hope that Congress will listen to the growing movement of activists throughout the country who are speaking out on this. Various petitions to the President have gathered more than 400,000 signatures, the most prominent was signed by Lt. Colonel and former Chief Prosecutor at Guantanamo, Morris Davis.

People have rallied and held vigils in cities and towns, flooded the White House and Southern Command with phone calls and, by the hundreds, fasted in solidarity with the hunger strikers. The faith community has called Guantanamo a deep moral wound, and 38 senior religious leaders sent the President and Congress a letter calling for the closure of Guantanamo.

Most dramatically, several U.S. citizens — among them military veterans — are now deep into open-ended fasts, risking their health and even their lives in their effort to see Guantanamo closed.

If any other country were treating prisoners the way we are treating those in Guantanamo we would roundly and rightly criticize that country. We can never retake the legal and moral high ground when we claim the right to do unto others that which we would vehemently condemn if done to one of us.

The story of Guantánamo remains the shameful case of the U.S. government rounding up nearly 800 men and boys, indiscriminately labeling them “the worst of the worst,” and throwing them into an island prison designed to exist beyond the reaches of the law, where they would have no

right to challenge their detention or abuse. The vast majority of the prisoners at Guantánamo should never have been detained in the first place. Many were simply in the wrong place at the wrong time and were fleeing the chaos of war when U.S. forces entered Afghanistan.

The prison at Guantánamo continues to exist in violation of both ethical and legal standards, and at risk to our collective safety. President Obama and Congress risk making Guantánamo and the Bush detention regime permanent features of the U.S. system. .

That's why we call on the following:

- **Congress must work with the administration to charge or release the men detained at Guantánamo. In 2004 and 2008, the U.S. Supreme Court ruled that the prisoners at Guantánamo may challenge their detention in U.S. federal court by means of habeas petitions.** Since then, federal judges have ruled in the great majority of cases that the government lacked evidence sufficient to justify the continued detention of the petitioners. Other men at Guantánamo have been cleared for release by the U.S. government's own Guantánamo Review Task Force, which consists of representatives from every government agency with a stake in the matter, including the Department of Justice, the Department of Defense, and the CIA. All men ultimately cleared for release by the courts or the government should be immediately repatriated or resettled, and all others should be formally charged and tried in a fair and open proceeding.

- **Lift the ban on resettling men into the United States. More than 15 countries, including France, Spain, Portugal, Ireland, Hungary, Belgium, Switzerland, Albania, Latvia and Palau, have accepted detainees for resettlement without incident.** The U.S. government should also offer a home to men who have won their habeas cases or been cleared for transfer and have no other safe country to go to. Offering to resettle such men would also encourage other countries to make similar offers and help shut Guantánamo.
- **Fully investigate the deaths of men who died in detention, including the three who died in 2006. Three detained men who were never charged with any crime died at Guantánamo in June 2006.** Initially reported as suicides, new evidence from four soldiers stationed at the base has raised serious questions about the circumstances surrounding their deaths. Until now, the Obama administration has not only failed to conduct an independent and thorough investigation of the deaths but has opposed inquiry and review by the courts.
- **Take responsibility for the well-being of the men after they are released and compensate those who have been wrongly imprisoned.** The U.S. government must not hold men without charge in inhumane conditions for years, subject them to abuse including torture, and then repatriate and resettle them in far corners of the world, leaving their rehabilitation and reintegration to other governments, organizations, and individuals. The government has a

responsibility to ensure that the men have adequate support and resources after release.

President Obama himself said that Guantanamo has become a symbol around the world for an America that flouts the rule of law. It is high time, over a decade after the 9/11 attacks, for the US to turn the page on this sordid chapter of our history.

GENERAL JOSEPH P. HOAR, USMC (RET.)
 GENERAL DAVID M. MADDOX, USA (RET.)
 LIEUTENANT GENERAL ROBERT G. GARD, USA (RET.)
 LIEUTENANT GENERAL ARLEN D. JAMESON, USAF (RET.)
 MAJOR GENERAL MARI K. EDER, USA (RET.)
 MAJOR GENERAL MELVYN S. MONTANO, USAF (RET.)
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 BRIGADIER GENERAL KEITH H. KERR, CSMR (RET.)
 BRIGADIER GENERAL ANTHONY VERRENGIA, USAF (RET.)

July 24, 2013

Senator Richard Durbin
 Chairman
 Senate Judiciary Committee
 711 Hart Senate Building
 Washington, DC 20510

Senator Ted Cruz
 Ranking Member
 Senate Judiciary Committee
 185 Dirksen Senate Building
 Washington, DC 20510

Re: Subcommittee on the Constitution, Civil Rights and Human Rights Hearing on Closing
 Guantanamo: The National Security, Fiscal, and Human Rights Implications

Dear Chairman Durbin and Ranking Member Cruz:

As we end combat operations in Afghanistan, we must face the question of what to do with the remaining 166 detainees at Guantanamo. At the end of the Iraq war, we transferred 10,000 detainees from U.S. custody to the government of Iraq. We have already transferred some 4,000 Afghan detainees held as prisoners of war in Afghanistan to their government. These transfers were seen as essential aspects of our national security strategy, and in this respect the transfer of Guantanamo detainees is no different.

What is different is that Guantanamo is a symbol of torture and injustice not befitting a nation that is a beacon of liberty to the world.

As retired generals and admirals, we are sworn to uphold our Constitution, and the laws and the treaties by which our nation is bound. Torture violates the Geneva Conventions, the Convention Against Torture, the Uniform Code of Military Justice, and domestic laws. Moreover, torture is immoral and unreliable, and places our own troops in danger. The torture at Abu Ghraib and Guantanamo diminished our moral standing in the world, and as long as the prison remains open, it will be a dark reminder of our past.

The military commissions at Guantanamo, in their many incarnations, remain illegitimate in the eyes of the world. When the presiding judge cannot answer whether the U.S. Constitution applies and the CIA was discovered to have the ability to censor the proceedings, among so many other delays and questions, the commissions are seen as a poor substitute for justice.

Guantanamo imperils our nation's ability to secure cooperation and intelligence from our allies abroad. Both the military and the intelligence community are only as effective as the information we collect from partners on the ground, who remain less likely to cooperate so long as the United States turns a blind eye to the rule of law.

There remains a clear path to closing Guantanamo. The 2010 Guantanamo Review Task Force, which included all the relevant security and intelligence agencies, provided a comprehensive framework for moving forward. That work should continue unimpeded by statutory transfer restrictions that impede the work of our Defense, State and intelligence agencies. Our security officials and those of our partners abroad can mitigate the risk of any transfers.

Terrorists aim to sow fear, and thereby to cause us to change who we are. We should demonstrate our moral courage by standing true to our values and laws. Closing Guantanamo is a necessary step forward in reaffirming our commitments to ourselves and to the world. We welcome this Committee's hearing on Guantanamo and urge the Committee to explore how to remove any remaining impediments to closing the Guantanamo chapter in our history.

Sincerely,

General Joseph P. Hoar, USMC (Ret.)
 General Charles C. Krulak, USMC (Ret.)
 General David M. Maddox, USA (Ret.)
 General Merrill A. McPeak, USAF (Ret.)
 Lieutenant General Robert G. Gard, USA (Ret.)
 Vice Admiral Lee F. Gunn, USN (Ret.)
 Lieutenant General Arlen D. Jameson, USAF (Ret.)
 Lieutenant General Charles Otstott, USA (Ret.)
 Major General Mari K. Eder, USA (Ret.)
 Rear Admiral John D. Hutson, JAGC, USN (Ret.)
 Major General Melvyn S. Montano, USAF (Ret.)
 Major General William L. Nash, USA (Ret.)
 Major General Thomas J. Romig, USA (Ret.)
 Major General Walter L. Stewart, Jr., USA (Ret.)
 Brigadier General John Adams, USA (Ret.)
 Brigadier General David M. Brahms, USMC (Ret.)
 Brigadier General Stephen A. Cheney, USMC (Ret.)
 Brigadier General James P. Cullen, USA (Ret.)
 Brigadier General Evelyn P. Foote, USA (Ret.)
 Brigadier General Gerald E. Galloway, USA (Ret.)
 Brigadier General Dennis P. Geoghan, USA (Ret.)
 Brigadier General Leif H. Hendrickson, USMC (Ret.)

Brigadier General John H. Johns, USA (Ret.)
Brigadier General Keith H. Kerr, CSMR (Ret.)
Brigadier General Murray G. Sagsveen, USA (Ret.)
Brigadier General Anthony Verrengia, USAF (Ret.)

Remarks of Matthew J. O'Hara, Chicago, Illinois

Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

Hearing on

Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications

July 24, 2013

I want to thank Senator Dick Durbin for convening this very important hearing. Senator Durbin has been a steadfast leader in Congress, with his usual clear and reasonable voice, on the subject of straightening out the mess our country has created in its prison in Guantanamo Bay, Cuba. I am a lawyer in Chicago, Illinois, and since 2006 I have represented men on a *pro bono* basis who are in our prison at Guantanamo Bay.

In 2010, two of my clients imprisoned in Guantanamo were resettled in European countries because it was not safe or feasible for them to return to their homes. One man was given a haven in Spain, and the other in Bulgaria. They have both struggled mightily with their reintegration into society, especially in countries not their own where they did not speak the language, but with the tremendous support of their new countries, they have progressed. They are the farthest thing from a threat to anyone, let alone a threat to the national security of our great and powerful country.

But here in 2013, I still have a client at Guantanamo, a 34-year old man from Tajikistan named Umar Abdulayev. Mr. Abdulayev continues to suffer from endless, indefinite detention at U.S. hands for no good or legitimate reason.

After seven years of legal work, it is hard to know what to say about Guantanamo that I have not said, and that many others have said, so many times before. Words have really failed us, because what is so badly needed now is action. While President Obama has been eloquent on the subject of Guantanamo, he has not acted consistent within his authority as President and

Commander-in-Chief of the nation's armed forces. Instead, he has let men like my client Mr. Abdulayev languish even after his inter-agency senior-level task force cleared him for release in 2010.

Congress also bears its share of responsibility. It has enacted laws in the guise of defense budget measures attempting to tie the President's hands on Guantanamo. Too many members of Congress have engaged in mindless fear mongering and demagoguery, based on assertions that are patently not true. Other members of Congress have allowed themselves to be demagogued for fear of being painted as "soft on terrorism." We need members of Congress to stop the fear mongering, and stand up for our Constitution and for human rights, even if they are the human rights of Muslim men from far-away lands. Almost twelve years after 9/11, Americans are tired of fear and the politics of fear.

The third branch of our government has been only a beacon of despair for men locked in Guantanamo. While district court judges have done their best to wrestle with these cases, the Court of Appeals for the D.C. Circuit has made effective judicial relief impossible for the men in prison at Guantanamo. It has created a legal standard in which the courts have to credit any assertion in any government interrogation report, no matter the source, no matter how many layers of hearsay, no matter the lack of personal knowledge by the maker of the statement, no matter the motives of the person who originated the statement, no matter the coercion that the makers of the statement endured. The court's Guantanamo case law calls every game in the government's favor before it starts. It is no wonder that Mr. Abdulayev and so many others have dismissed their habeas corpus petitions in consultation with their lawyers. And the Supreme Court has not seen fit to step back in and rectify what the court of appeals has done.

What remains true for Mr. Abdulayev after all these years, just as it is for so many men at Guantanamo, is that he was not captured on a battlefield, or even in a country with which we were at war. He has not been charged with any offense, nor will he ever be. No court has ever found his detention lawful. When he was arrested by Pakistani police in 2001, he was only 23. Over these years, he has turned from a youth into a mature man with grey hair in his temples. He rails at not having a sentence, at not knowing his fate, of not knowing when if ever he will be free. But he is also nevertheless an admirer of the United States and of American people.

I ask the members of this Subcommittee and the members of Congress as a whole to stop passing legislation that attempts to restrict the President's right to transfer Guantanamo prisoners and that infringes on the powers of the executive branch to charge crimes in cases where it thinks appropriate. I also urge the members of the Subcommittee to call on President Obama to put his strong words back into action after a three-year period of doing nothing. The men at Guantanamo deserve to be released or to be charged in court. The rights enshrined in our Constitution, and fundamental human rights that our systems of law and government are based on, depend on it.



**MUSLIM PUBLIC AFFAIRS COUNCIL
STATEMENT FOR THE RECORD**

**Hearing on Closing Guantanamo: The National Security, Fiscal and Human Rights
Implications**

**SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS and HUMAN RIGHTS**

UNITED STATES SENATE

JULY 24, 2013

Chairman Durbin, Ranking Member Cruz and members of the Subcommittee: We are honored to submit this statement for the record on behalf of the Muslim Public Affairs Council (MPAC) regarding today's hearing on the national security, fiscal and human rights implications of closing the Guantanamo Bay detention facility. We commend the leadership of the members of the Committee for holding today's hearing, "Closing Guantanamo: The National Security, Fiscal and Human Rights Implications."

MPAC is a faith based American institution working for the integration of Muslims into American pluralism. To that end, we actively strive to affect policy reforms that uphold core American values and preserve constitutionally protected freedoms of all Americans. We have done extensive work on highlighting the need to close the Guantanamo Bay detention facility for the sake of our counterterrorism and national security efforts. There are real moral, fiscal and national security implications in maintaining the facility. As such, we urge Congress to follow your leadership and take increased measures to learn and understand the implications of keeping Guantanamo Bay open.



We thank you for holding this critical hearing on the implications of the use of keeping Guantanamo Bay open for detention purposes. The hearing comes two months after President Barack Obama's speech at the National Defense University regarding our nation's future counterterrorism policy, and included a renewed pledge to focus efforts on closing Guantanamo Bay. We hope the hearing will examine legislative proposals to facilitate the closure of Guantanamo, including provisions authorizing detainee transfers as detailed in the National Defense Authorization Act (NDAA) – soon to be considered on the Senate floor.

The hearing will address the national security, fiscal and human rights concerns that surround the continued indefinite detention of the 166 remaining detainees at the facility, including 86 detainees who have already been cleared for transfer. We hope the hearing will also explore how the continued operation of Guantanamo Bay undermines the moral authority of our nation in the international community and undercuts fundamental values of the American justice system, including due process and rule of law.

The question we must now ask ourselves is: Is the continued use of Guantanamo Bay a necessary tool to maintain our national security and counterterrorism efforts? The U.S. is the only superpower in the world and is protected by the most powerful military in the history of civilization. According to a recent Los Angeles Times op-ed titled An America Eternally 'at War,' our military capability will not diminish anytime soon; but will our political and moral leadership hold the same weight?



Yet, the debate among policy-makers and pundits has been whether the moral implications of keeping the detention facility open outweigh its ever-dwindling national security use.

Congressional gridlock, indecisions and wasted taxpayers' money are keeping Guantanamo open. Keeping the facility open costs \$177 million per year on average, with the Department of Defense recently requesting \$200 million more to renovate the facility. The average cost to house a criminal in a high-security facility in the U.S. is less than \$30,000; compare that to more than \$1 million for each of the detainees. The fiscal implications of maintaining Guantanamo Bay are indeed outrageous.

Costs aside, the moral repercussions of Guantanamo Bay are inexcusable. Of the 166 detainees, 86 have already been approved for transfer; the detainees are being held without any charges and without any evidence of guilt. Now detainees are being forced through nasal tubes to eat, and additional medical teams are being flown in to the facility to assist the overwhelmed staff.

There is no more room for lip service; the doors of this prison must be closed. President Obama said "I continue to believe that we need to close Guantanamo Bay. I think it is critical for us to understand that Guantanamo is not necessary to keep us safe. It is expensive, it is inefficient, it hurts us in terms of our international standing, it lessens cooperation with our allies on counterterrorism efforts, it is a recruitment tool extremists. It needs to be closed."

Impact of Government Actions



Government actions and political discourse shape the public's perception of maintaining national security while upholding our moral code. Congress must take on the leadership role its members were elected for and close the facility which has brought shame on this nation. After 11 years, Guantanamo Bay now represents human rights violations, including torture, detention without charge and indefinite detentions.

In 2007, MPAC President Salam Al-Marayati was the first American Muslim to observe conditions at the Guantanamo Bay detention center. At that time, MPAC commended and supported then Secretary of Defense Robert Gates' public call for the closing of the prison. This stance has been supported by human rights groups which have investigated and condemned U.S. interrogation and incarceration practices at Guantanamo.

Conclusion

The problem with Guantanamo is not the operation per se, but the poor policy that created a detention center that does not serve American interests and is in violation of basic human rights. While government officials have stated a desire to shut the detention center down, real political will on Capitol Hill among the administration and lawmakers must be demonstrated in order to turn this into an overdue reality.

The ways and means by which detainees were captured and transferred to Guantanamo are key factors in determining the validity of their detention in the first place. Were they Al-Qaeda agents planning attacks on America, and if so, on what evidentiary basis was that determined? Corrupted intelligence has become too often and overlooked mistake in various incidents. The



American public will become more confident in decision-making at the policy and military levels of our government if more transparency is placed in the process.

MPAC is heartened by the Subcommittee's leadership in holding this hearing and we are grateful for the opportunity to present our position on the much-needed closing of Guantanamo Bay. It's clear that the detention center is killing the character of our nation.

Thank you again for this opportunity to express the views of the Muslim Public Affairs Council. We welcome the opportunity for further dialogue and discussion about these important issues.

Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications
Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Human Rights
July 24, 2013
Statement for the Record of the National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

NACDL seeks to uphold the rule of law, ensure equal justice and due process for persons accused of crime, and promote the proper and fair administration of criminal justice. In furtherance of our mission, NACDL supports closing Guantanamo. Since 2002, NACDL has been at the forefront of criminal defense issues surrounding the detention facility and military commissions at Guantanamo Bay, Cuba. Our dedication to justice and due process for the men detained in Guantanamo led to our creation of the John Adams Project in partnership with the American Civil Liberties Union.¹ Through this project, NACDL members were among the first lawyers to step up to represent detainees through pro-bono work. These lawyers include some of the most prominent and experienced criminal defense lawyers in the country, who assisted under-resourced military defense lawyers for detainees facing capital prosecutions in the Guantanamo military commissions.

The protection of civil and constitutional rights and liberties in matters of national security is one of NACDL's principal goals. The national security expertise of NACDL members ranges from work on military commissions, to indefinite detention, to electronic surveillance. NACDL continues to oppose unfair and inhumane treatment of Guantanamo detainees and the second-class system of justice that is the Guantanamo military commissions.

During the President's speech in May at the National Defense University, he stated that the original premise for opening the detention facility at Guantanamo—a legal black hole—was found unconstitutional five years ago, and since then, Guantanamo “has become a symbol

¹ While the John Adams Project has come to an end, NACDL continues to provide expertise, consultation, and support to the military and civilian lawyers representing defendants who are charged in the military commissions at Guantanamo.

around the world for an America that flouts the rule of law.”² The indefinite detention without charge or trial of detainees at Guantanamo continues to damage the international reputation of the United States and imperil the members of our military around the world.³ Indefinite detention is the antithesis of American principles of fair justice. The Guantanamo detention facility should be closed, and its detainees released, transferred, or tried in the civilian justice system.

Many detainees have already been cleared for transfer out of Guantanamo

Of the 166 men remaining at Guantanamo, 86 have been officially cleared for transfer by President Obama’s Interagency Guantanamo Review Task Force.⁴ These men should be transferred immediately. The year-long review process included a Comprehensive Interagency Review by more than 60 high-level officials from the intelligence community who made unanimous decisions on each detainee. Congress should trust their judgment and not stand in the way of these transfers. Transferring these men is an essential first step toward closing Guantanamo.

Many foreign countries are ready to receive transferred detainees. In particular, many governments, including many of our allies, have pressed for the return of their citizens.⁵ Of the 86 detainees cleared for transfer, 56 are citizens of Yemen. In June, President Obama lifted his self-imposed ban on transfers to Yemen, and the Senate must ensure that no new transfer restrictions to Yemen, like a provision in the House version of the 2014 National Defense Authorization Act, are enacted.

Additionally, figures released by Congressman Adam Smith, Ranking Member of the House Armed Services Committee, reveal that the United States is spending approximately \$1.6 million per detainee each year that Guantanamo remains open. That is almost 50 times the cost of detaining an individual—post-conviction—in a high security federal prison.⁶ This is money being spent in a time of strict sequestration, to hold 86 men who have already been cleared for release from Guantanamo.

² Press Release, President Obama, Remarks by the President at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

³ Reuters, *Colin Powell says Guantanamo should be closed*, Reuters.com (June 10, 2007), available at <http://www.reuters.com/article/2007/06/10/us-usa-powell-idUSN1043646920070610>.

⁴ Guantanamo Review Task Force, Final Report (Jan. 22, 2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

⁵ Reuters, *Obama Must Follow Guantanamo Promise With Action: Yemen*, Reuters.com (June 2, 2013), available at <http://www.reuters.com/article/2013/06/02/us-ds-yemen-us-idUSBRE9510B720130602>; The governments of Kuwait, the United Kingdom, and Afghanistan have also publicly commented on their desire to have their nationals returned. Boston Herald, *Allies Eager to Bring Home Guantanamo Detainees*, BostonHerald.com (July 13, 2013), available at http://bostonherald.com/news_opinion/international/americas/2013/07/allies_eager_to_bring_home_guantanamo_detainees.

⁶ Blog, Representative Adam Smith, The Cost of Detention at Guantanamo Bay (June 5, 2013), available at <http://adamsmith.house.gov/blog/?postid=336801>.

Congress has already given the administration the authority it needs to transfer many detainees out of Guantanamo to foreign countries, and Congress should continue to urge the administration to use those tools. However, giving the administration broader flexibility to effect transfers would be helpful in ensuring the quick and responsible closure of Guantanamo. NACDL supports the Senate Armed Services Committee version of the 2014 National Defense Authorization Act for this very reason, and urges inclusion of the detainee provisions in the final bill.

Detainees should be tried in Article III courts

Detainees must not be tried in a second-class system of justice. The United States should not denigrate fundamental American values of upholding the rule of law and the principles of equal justice and due process by conducting trials in the Guantanamo military commissions. While “reformed” in 2009, the military commissions continue to permit the use of hearsay and derivative evidence discovered from coerced confessions, among many other deficiencies. The defense is often denied necessary resources, especially in death penalty cases, as well as access to evidence that may be used at trial.

Additionally, the use of the Guantanamo military commissions may no longer be a viable option to try many detainees. In 2012, the Court of Appeals for the District of Columbia ruled in *Hamdan v. United States (Hamdan II)* that material support for terrorism, which was not a recognized violation of the international law of war at that time the Military Commissions Act (MCA) was enacted (2006 in Hamdan’s case), is not prosecutable under the MCA.⁷ A few months later, the court also held in *Al-Bahlul v. United States* that the charge of conspiracy is similarly flawed.⁸ This significantly narrows the jurisdiction of the Guantanamo military commissions, and reduces the number of detainees who were slated for prosecution by commission. *Hamdan II* and *Al-Bahlul* signal a much-needed move of trials to Article III federal courts if the United States is going to continue prosecutions.

The traditional criminal justice system is more than capable of handling complex national security and terrorism prosecutions. The federal courts’ track record speaks for itself: the federal court system has handled more than 400 terrorism-related cases since 9/11,⁹ while the Guantanamo military commissions have only completed seven cases, one of which has been

⁷ *Hamdan v. United States*, 696 F.3d 1238 (2012).

⁸ *Al-Bahlul v. United States*, 2013 WL 297726 (2013) (overturning Al-Bahlul’s conviction of conspiracy by military commission. The D.C. Circuit relied on *Hamdan II* to overturn his conviction based on the fact that it was not a violation of the international law of war at the time the crime was committed, and therefore could not be tried in military commissions. This case was granted en banc review in April 2013 to determine whether military commissions may try defendants for pre-2006 instances of standalone conspiracy and providing material support for terrorism.).

⁹ Representative Adam Smith, *An Exit Strategy From Detention at Guantanamo*, HuffingtonPost.com (May 22, 2013), available at http://www.huffingtonpost.com/rep-adam-smith/guantanamo-exit-strategy_b_3319616.html?utm_hp_ref=politics.

overturned on appeal and another is hanging in the balance.¹⁰ Additionally, the cases tried in federal court have provided valuable intelligence obtained through legal means, as criminal prosecutions in federal court do not preclude gathering intelligence, and defendants often cooperate with U.S. investigators.¹¹

Guantanamo is a money black hole

The prohibitively costly detention facility at Guantanamo Bay is a large fiscal burden for the United States that cannot be maintained during an economic sequester. Figures released by Congressman Adam Smith show that the United States is spending approximately \$1.6 million per detainee each year that Guantanamo remains open. That is almost 50 times the cost of detaining an individual in a high security federal prison.¹² Beyond those basic maintenance costs, a proposed bill in Congress would increase the money spent on Guantanamo by an additional \$61 million above what the Department of Defense has requested to build permanent facilities. Should this bill be approved, this would total an extra \$247.4 million to make the facilities more permanent at a time when the administration is pushing for Guantanamo to be closed.¹³

The increasing healthcare costs of Guantanamo detainees are an added concern. The deteriorating health of the aging population and the ongoing hunger strikes have led to increasing medical costs to adequately supply the small hospital available to detainees on the island. Since everything has to be brought into Cuba from elsewhere, including many medical personnel, the cost of maintaining the acute hospital is an extreme financial burden.¹⁴

Besides the upfront cost of Guantanamo Bay in dollars, the facility creates opportunity costs for the Department of Defense in reducing its capacity to use those critical funds on projects that enhance the security of our nation, and our military. While more money is spent every year to indefinitely detain individuals at Guantanamo Bay, the Department of Defense is facing large budget cuts elsewhere in the department. Closing the Guantanamo Bay detention facility can ensure that detainees are held in secure facilities that are more fiscally appropriate, while reserving critical funding for our military.

¹⁰ See all Military Commissions Cases, <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (last visited July 22, 2013).

¹¹ Peter Finn, *Somali's Case a Template for U.S. as it seeks to prosecute terrorism suspects in federal court*, WashingtonPost.com (Mar. 30, 2013), available at http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60_story.html.

¹² Blog, Adam Smith, *supra* note 6.

¹³ Op-Ed, Adam Smith, *supra* note 9.

¹⁴ *Hearing on The Posture of the U.S. Northern Command and U.S. Southern Command: Before the House Armed Services Comm.*, 113th Cong. 24 (2013) (statement of General John F. Kelly, United States Marine Corps Commander, United States Southern Command), available at <http://docs.house.gov/meetings/AS/AS00/20130320/100395/HHRG-113-AS00-Wstate-KellyUSMC-20130320.pdf>.

Conclusion

NACDL supports the prompt and responsible closure of the detention facility at Guantanamo Bay, Cuba. It is in our national security and fiscal interests to close Guantanamo. To aid in closure, NACDL recommends that the Senate pass the Senate Armed Services Committee's version of the 2014 National Defense Authorization Act, which includes language that would further facilitate transfers to foreign countries and to the United States to face prosecution in an Article III court. This action would provide the President with the flexibility he needs to fulfill his promise of closing the Guantanamo detention facility.

Now is the time for action. Congress has the full support of the President at this moment in time. Both Congress and the administration should work together to take the critical first steps of transferring individuals who have already been cleared by the President's Interagency Task Force, as well as opening up the federal courts to try Guantanamo detainees in a system much more fair and constitutional than the Guantanamo military commissions.

July 16, 2013

TO WHOM IT MAY CONCERN:

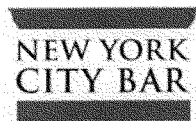
We want to thank you for listening to us. We always believed that America is the haven for human rights and we urge you to take the human rights of our son and our family into consideration.

We haven't seen or talked to our son in 15 years and we miss him a lot. We are not asking you to do something against the law of your country if our son is found guilty of the charges he is accused with. Our only request is for you to have mercy on our family and allow us to talk to him. Our eighty-five years old father's only wish in life is to be able to speak with Abdel Rahim or see him before his death. The same is true of our mother. Her health is deteriorating by the day, in fact she is unable to fast this Ramadan due to her deteriorating health conditions, and her main concern is to know that her son is doing well. She says that at this stage in her life she would like to see her son so that she could die in peace.

You may have children, and we ask you to imagine not being able to talk or see your children for so many years for crimes they may or may have not committed. Don't you think this would be the harshest punishment? Please have mercy on our family and our elderly parents and get us permission to call or skype with our beloved brother and son. We love him dearly and we miss him every day.

Thank you,

//s
The Nashiri's



STATEMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

To

SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND
HUMAN RIGHTS

Regarding

CLOSING GUANTANAMO: THE NATIONAL SECURITY, FISCAL AND HUMAN RIGHTS
IMPLICATIONS

July 24, 2013

The Association of the Bar of the City of New York applauds Senator Durbin for convening this hearing to focus attention on the closing of the detention facility at Guantanamo. We are a professional association of over 24,000 members, founded in 1870. Since the September 11th attacks, this Association has issued numerous thoroughly researched and thoughtfully reasoned reports and letters to promote America's long-term security through respect for lawful and humane policies.¹

We have closely monitored developments in Guantanamo from the time the detention facility was opened, raising our serious concerns about this facility and the handling of detainees, and have urged that it be closed. In addition, this Association was one of the first to address the shortcomings of using military commissions to try detainees, issuing a report promptly after President George W. Bush's November, 2001 Military Order establishing the Commissions. We continue to have observer status and regularly send our committee members to military commission proceedings.

The continued use of the Guantanamo detention facility is a major failing that has long-term repercussions. The history of the facility as a site where abusive interrogation methods amounting to torture were used, and its continued role detaining individuals who cannot hope to see justice done even though in many cases they have been cleared for release, undermine much

¹ Many of these works are collected in James R. Silkenat and Mark R. Shulman, eds., *The Imperial Presidency and the Consequences of 9/11: Lawyers Respond to the Global War on Terror* (2007); more recent works are collected online at <http://www2.nycbar.org/Publications/reports/reportsbycom.php?com=138>.

of what this nation has done to be world's most respected democracy. Guantanamo also serves as a galvanizing symbol for recruiting legions of young potential terrorists who focus their anger and actions against the United States. As President Obama said in his May 23, 2013 speech, "GTMO has become a symbol around the world for an America that flouts the rule of law. Our allies won't cooperate with us if they think a terrorist will end up at GTMO."

This image has been exacerbated by the hunger strikes that have been ongoing at Guantanamo for the last months. The strikes reflect the suffering and hopelessness inflicted by a policy of unjustified indefinite detention that undermines the rule of law. Many of the detainees have been incarcerated for more than 11 years and see no hope of leaving the prison alive.

In 2009, President Obama announced his decision to close the Guantanamo facility and he reiterated that intention this year. The decision was sound in 2009 and the passage of time has only weakened the arguments for keeping the facility open. As a nation we have made substantial progress in the struggle against al Qaeda, the Taliban, and associated forces; our country is safer and more secure today than it was in 2009; the Iraq war is over and a concrete timetable has been announced for the end of the combat mission in Afghanistan; and the Guantanamo facility remains a recruiting tool for forces hostile to the United States even as it has become an expensive drain on the public fisc in a time of austerity and budget discipline.

We welcome legislative proposals that would facilitate closing the Guantanamo facility. To assist in moving toward that closure, we offer the following recommendations regarding the detainees:

- In the short term, the top priority should be to release or transfer the 86 detainees (representing more than half of the current population) who have been cleared for release by the Guantanamo Review Task Force.² Each day of continued detention is a grave injustice for these individuals and a real moral problem for our country. Our ideals of fairness and justice cannot abide the detention of individuals who have never been charged with any offense, yet who remain in captivity, for many years, despite having been cleared for release or transfer after a thorough review. In addition, this indefinite detention remains, in the words of 25 retired military flag officers, "an effective recruiting tool for our enemies."³
- Recognizing the practical and political obstacles to immediate closure, we suggest that the strategy should be to reduce the prison population steadily and incrementally, adamantly resisting any suggestion to add new detainees, with the goal of winnowing the population down to a small number of detainees who

² U.S. Gov't., Accountability Office, *Guantanamo Bay Detainees: Facilities and Factors for Consideration if Detainees Were Brought to the United States* (Nov. 2012) at 9, available at <http://www.gao.gov/assets/660/650032.pdf> (hereinafter, "November 2012 GAO Report").

³ Letter from Retired Generals and Admirals to President Barack Obama (Jan. 9, 2012), available at <http://www.humanrightsfirst.org/wp-content/uploads/Retired-Generals-Admirals-on-Ten-Year-Anniversary-of-GTMO.pdf>.

ultimately can be handled through transfers, prosecutions, and/or other arrangements.

- For many of the 86 individuals who have been cleared for release, a continuing obstacle to transfer is Section 1028 of the National Defense Authorization Act, which establishes significant obstacles preventing detainee transfers to foreign countries. This ill-advised statute infringes on executive authority, unwisely micromanages the difficult task of dealing with individual detainees, and results in a freeze in which the clear losers are the human beings who remain locked up, day after day, long after they have been cleared for release. In September, 2012, one such individual, Adnan Farhan Abdul Latif, committed suicide, apparently out of desperation. There remains some risk of recidivism by some of the detainees – as is the case whenever any prisoner is released from any prison – but those risks have been overstated and they should not paralyze the entire mechanism of detainee transfer and release.⁴ However, while Section 1028 imposes significant obstacles to release and should be repealed, it provides a path for release or transfer of detainees through Executive action that culminates in a national security waiver by the Secretary of Defense. We urge the Administration to direct the Secretary of Defense to take actions to satisfy the requirements, wherever possible, for issuing waivers as specified in Section 1028.
- Another significant problem with detainee transfers is the unsettled situation in Yemen, which according to the U.S. Government Accountability Office affects 30 of the 86 detainees who have been cleared for transfer.⁵ There is no easy solution to this problem, but the case of the Uighurs shows that creative solutions are possible. President Obama's lifting of the ban on transfers to Yemen is a constructive first step, welcomed by the Yemeni government, which has indicated an interest in cooperation. The detainees from Yemen should not be treated as a monolithic group; those among them who have been judged to present the lowest risk should be repatriated or transferred to a third country. A gradual process of transfers would be better than no process at all. More broadly, we suggest that a priority of the newly-appointed senior envoy Clifford Sloan should be to develop a concrete, sustainable plan to allow for the release of all of the Yemeni detainees who have been cleared for release.
- For those detainees who have engaged in criminal conduct, we urge prosecutions in each case where in the professional judgment of DOJ prosecutors, the admissible evidence would support a prosecution. We agree with the Obama

⁴ In a report dated September 5, 2012, the Director of National Intelligence found only three confirmed cases of "reengagement" among the 70 detainees who have been released since January 2009. This is a rate of only 4.3%. See Director of Nat'l Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (Sept. 5, 2012) at 1, available at <http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Reports%20and%20Pubs%202012/Summary%20of%20the%20Reengagement%20of%20Detainees%20Formerly%20Held%20at%20GTMO.pdf>.

⁵ See November 2012 GAO Report at 9.

Administration that there be a strong presumption in favor of civilian-court prosecutions, and we believe the NDAA prohibition on prosecutions in U.S. courts, Section 1027, is profoundly misguided. The one Guantanamo detainee who to date has been transferred to New York for prosecution, Ahmed Ghailani, was convicted in 2010 for his role in the 1998 East Africa embassy bombings, and is now serving a sentence of life without possibility of parole at the “Supermax” prison in Florence, Colorado.⁶ The legitimacy of Ghailani’s conviction and sentence are unquestioned. Despite the hyperbole, there were no disruptions or problems at the courthouse in lower Manhattan during his trial.

- A particular challenge is how to deal with the 46 detainees at Guantanamo who, based on the findings of the 2009 Task Force, cannot safely be released but also cannot feasibly be prosecuted.⁷ In his National Archives speech of May 2009, President Obama described this as “the toughest single issue that we will face.”⁸ Although the legality of detaining these individuals has generally been affirmed by our courts, and the 2009 Task Force found that they pose a real threat, it is unrealistic and legally untenable for them to be held indefinitely without charge or trial. As former Defense Department General Counsel Jeh Johnson observed in a thoughtful address at Oxford University, the armed conflict against al Qaeda is *not* perpetual and indefinite; to the contrary, “[w]ar” must be regarded as a finite, extraordinary and unnatural state of affairs,” and “[p]eace must be regarded as the norm toward which the human race continually strives.”⁹ While we recognize that terrorist threats from a variety of sources can be expected to continue, at some point, hopefully sooner than we expect, the armed conflict against al Qaeda will be over and the legal justification for continued long-term detention without trials will evaporate.¹⁰ We suggest that the planned drawdown of combat troops in Afghanistan in 2014 could provide the impetus, politically and legally, to re-examine the cases of the long-term detainees, whether through Periodic Review Boards – which the Obama Administration has just announced it will activate – or otherwise, with a view toward eventual prosecution, transfer, or release as appropriate.

⁶ See U.S. Att’y’s Office for the S. Dist. of N.Y., *Ahmed Khalfan Ghailani Found Guilty in Manhattan Fed. Court of Conspiring in the 1998 Destruction of United States Embassies in E. Africa Resulting in Death* (Nov. 17, 2010), available at <http://www.fbi.gov/newyork/press-releases/2010/nyfo111710a.htm>; Transcript of Sentencing at 71, *United States v. Ghailani*, S10 98 Cr. 1023 (LAK) (No. 1098).

⁷ See November 2012 GAO Report at 9. This number now may be substantially higher since the Chief Prosecutor has determined that at least 15 additional detainees cannot be prosecuted on charges of “material support” for terrorism. See page 6, *infra*.

⁸ *Remarks by the President on Nat’l Sec.*, Nat’l Archives (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

⁹ Jeh Charles Johnson, Gen. Counsel of the U.S. Dep’t of Def., *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, Address at the Oxford Union, Oxford Univ. (Nov. 30, 2012), available at <http://www.jawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

¹⁰ Although the question is settled as a matter of domestic U.S. law, there is today a lack of consensus in some quarters as to whether the United States is currently engaged in an armed conflict with global reach under international law.

- As noted in the November, 2012 GAO Report, moving Guantanamo detainees to secure prison facilities in the United States may be a viable option for the future. To date, political opposition and statutory prohibitions have prevented such a step, *see, e.g.*, NDAA Sections 1026 and 1027, but it should be explored as a cost-efficient alternative that would help achieve the goal of closing Guantanamo. However, moving detainees to the U.S., in the long run, should not be a substitute for the eventual prosecution, transfer, or release of such detainees.
- It is essential that Guantanamo detainees continue to have reasonable access to counsel and to the federal courts to test the legality and circumstances of their detention. Such access is mandated by the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which affirmed the constitutional rights of Guantanamo detainees to petition Article III courts for a writ of habeas corpus. In 2012, the Justice Department sought to impose new restrictions on counsel access for detainees whose habeas cases have been terminated. The government's position was rejected by Chief Judge Lamberth of the U.S. District Court for the District of Columbia. *See Memorandum Opinion, In re: Guantanamo Bay Detainee Continued Access to Counsel*, Miscellaneous No. 12-398 (RCL) (Sept. 6, 2012) (No. 1009). On December 14, 2012, the DOJ abandoned its appeal of Chief Judge Lamberth's well-reasoned decision, but the government continues to throw up roadblocks to counsel access for the Guantanamo detainees. Chief Judge Lamberth's recent decision directing the cessation of invasive groin searches of detainees in connection with meetings with their attorneys (a decision that was recently stayed by the D.C. Circuit)¹¹ offers pointed criticism of the government's continuing interference with reasonable counsel access at Guantanamo.
- Finally, we recommend that the section of the Military Commissions Act of 2006 that bars judicial review relating to any aspect of the detainees' detention, treatment or conditions of confinement (28 U.S.C. §2241(e)(2)) be repealed. As the detainees face endless imprisonment, many without trial, it becomes more important to permit judicial review of the conditions under which they are kept. The current hunger strike, the resulting force-feeding of many of the strikers, and other aspects of the conditions at Guantanamo should have the benefit of judicial scrutiny, as do criminal penal institutions in the United States.

Inexorably tied with the Guantanamo facility is the military commission system installed there. We believe that the heavy reliance being placed on these tribunals to try detainees is seriously misplaced. The record of the past 20 years overwhelmingly demonstrates that the Article III courts are up to the challenge of handling even the most complex terrorism cases.¹²

¹¹ *In re Guantanamo Bay Detainee Litigation*, Miscellaneous No. 12-mc-398 (RCL) (D.D.C., July 11, 2013).

¹² In a 2011 article, former Assistant Attorney General David S. Kris compiles voluminous evidence documenting the proven effectiveness of the criminal justice system in dealing with accused terrorists. David S.

The lengthy roster of just, credible, and, when appropriate, tough Article III prosecutions is a testament to the dedication and professionalism of the judges, prosecutors, defense counsel, and agents who have handled these cases. Another strength of civilian prosecutions is that they integrate our citizenry as jurors and trial observers. Our justice system is recognized at home and abroad as a bulwark of due process and procedural fairness and, indeed, as one of the central hallmarks of our democratic system of government. We should continue to make full use of it as a proven, effective part of our nation's counterterrorism strategy.

Although military commissions have a long history going back to the Revolutionary War, the attempt to re-introduce them as they were constituted after 9/11 was fundamentally flawed, culminating in the Supreme Court's 2006 decision finding that the commissions regime was unlawful under the Geneva Conventions.¹³

In 2009, Congress enacted legislation which significantly improved the discredited predecessor system. We commend Brigadier General Mark Martins for his efforts as Chief Prosecutor to promote due process, transparency, and professionalism in the reformed military commissions.¹⁴ In our observations of the proceedings, we have found the prosecution, defense counsel and the tribunal officials are working hard to achieve these aims. Nevertheless, and although it is premature to render any judgment about the legitimacy and effectiveness of the reformed commissions, it must be acknowledged that there continue to be problems with this parallel system of justice:

- The commissions have proceeded at an agonizingly slow pace. It is hard to believe, for example, that the individuals accused of perpetrating the 9/11 attacks have still not been brought to justice.
- Because of their novelty, the commissions are still, in some areas, "making it up as they go along." In contrast with the Article III courts, which rely on a robust body of precedent and a deep and experienced group of lawyers and judges, the reformed military commissions sometimes find themselves in uncharted waters. This is a real problem, especially where the cases are so difficult.

Kris, *Law Enforcement as a Counterterrorism Tool*, 5 *J. Nat'l Security L. & Policy* 1, 13-26 (Jun. 26, 2011), available at <http://www.jnslp.com/2011/06/26/law-enforcement-as-a-counterterrorism-tool/>. Mr. Kris' paper cites example after example in which the civilian court system, and FBI and DOJ investigators, developed critical intelligence; thwarted ongoing plots; and secured credible, just convictions and severe sentences. *Id.* at 14-17 (citing prosecutions of, among others, Ouassama Kassir, Ahmed Omar Abu Ali, Zacarias Moussaoui, Iyman Faris, John Walker Lindh, Hosam Maher Husein Smadi, Najibullah Zazi, David Headley, Tahawwur Rana, Faisal Shahzad, and Ahmed Ghailani); see also Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008) (citing and discussing statistical data and scores of examples of successful Article III terrorism prosecutions dating back to the 1980s); Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, 2009 Update and Recent Developments* (2009) (same).

¹³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁴ See Brigadier Gen. Mark Martins, Chief Prosecutor, Military Comm'ns, *Legitimacy and Comparative Law in Reformed Military Comm'ns*, Remarks at the N.Y.C. Bar Ass'n (Jan. 10, 2012), available at http://www2.nycbar.org/pdf/2190_001.pdf.

- The commissions are hobbled by their limited jurisdiction. In *Hamdan v. United States*, the D.C. Circuit reversed the conviction of a military commission defendant on grounds that the offense of conviction – material support for terrorism – was not a war crime under international law and thus was not amenable to prosecution before a military commission for conduct predating the 2006 MCA’s passage.¹⁵ A similar issue is presently before the D.C. Circuit in the case of Ali Hamza Ahmad Suliman al Bahlul, where the principal charge— conspiracy—is also not a war crime under international law. By contrast, in a civilian court prosecution, there would be no doubt about the court’s jurisdiction to adjudicate these charges against a terrorism suspect. As a result of *Hamdan*, General Martins felt compelled to reduce the number of detainees who are expected to be charged through the military commissions system from 35 to no more than 20, including the 14 detainees already charged, thus exacerbating the problem of prolonged indefinite detention discussed above.¹⁶
- Defense counsel – who are of course essential to any legitimate system of justice – have been subjected to particular burdens and difficulties in the military commissions proceedings. Due in part to the security restrictions, defense counsel have struggled with basic requirements such as having privileged communications with their clients and managing the difficult challenges of pretrial preparation and mounting a defense. Some of the most problematic restrictions were imposed by a prior Guantanamo commander, illustrating the impracticality of carrying out high-profile, complex prosecutions in a remote location.¹⁷
- Notwithstanding the good intentions and dedicated efforts of the military and civilian lawyers handling the commissions, we believe there will be continuing suspicions that the commissions remain a form of “second class” justice and that the decisions about whom to prosecute in commissions are based on dubious considerations. In short, it will be a real challenge for military commissions to earn the same legitimacy as civilian courts or courts martial.

Although we recognize the need to continue with the military commissions cases that are now pending, we are gravely concerned about the prospect of military commissions becoming

¹⁵ *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. Oct. 16, 2012).

¹⁶ Jane Sutton, *United States scales back plans for Guantanamo prosecutions*, Reuters (June 11, 2013) (<http://www.reuters.com/article/2013/06/11/uk-usa-guantanamo-idUKBRE95A0P320130611>).

¹⁷ See Letter from Samuel W. Seymour, President, New York City Bar Association, to Jeh C. Johnson, Gen. Counsel, United States Dep’t of Def. (Apr. 18, 2011), available at <http://www2.nycbar.org/pdf/report/uploads/20072108-LettertoDeptofDefenseProtectiveOrderGoverningCounselAccessToDetainees.pdf> (objecting to Protective Order and Procedures for Counsel Access to Detainees Subject to Military Comm’n Prosecution at the United States Naval Station in Guantanamo Bay, Cuba, dated Mar. 4, 2011).

institutionalized as a parallel system of justice for the long term. The current armed conflict is bound to end – and hopefully sooner rather than later. Accordingly, we urge that no new cases be referred to military commissions (including any new cases against existing Guantanamo detainees) and that, instead, efforts focus on completing the existing cases promptly, fairly, and in a manner that as nearly as possible comports with the procedures and norms applicable to civilian courts and/or courts martial. Should there be any future military commission prosecutions, we recommend that they occur within the United States, and not at Guantanamo, and that they be limited to a very small number with a clear and overriding nexus to armed conflict and international war crimes.

In conclusion, we urge Congress and the Obama Administration to take all necessary actions to close the Guantanamo detention facility and provide due process and fair treatment to all detainees in accordance with the basic principles on which this nation was founded.

**Testimony of
Detailed Military and Civilian Pro Bono Counsel
for Noor Uthman Muhammed
Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
24 July 2013**

INTRODUCTION

We thank Chairman Durbin and the Members of the Subcommittee for considering these important issues relating to the closure of Guantanamo. Our comments specifically address the proposed exceptions to the transfer restrictions of S. 1197, the National Defense Appropriations Act (NDAA).

There is a subset of detainees who have been deemed eligible for prosecution before military commissions and an even smaller group who have been charged and participated in the commission process. As history has demonstrated, particular members of this smaller group are excellent candidates for successful release from the facility at Guantanamo and repatriation to their countries of origin. Four individuals have been released as a result of successful military commission trials; three of these men pled guilty pursuant to plea agreements. The trials have been a success in that the process was completed and the U.S. government honored the outcome of each individual case by releasing the detainee.

Our client, Noor Uthman Muhammed ("Noor" as he prefers to be called) is also among this small group and is the next man whose military commission case will soon come to a conclusion. Noor entered into a pretrial agreement with the Government and pled guilty, pursuant to that agreement, in February 2011. Since that time he has honored his end of the bargain. He completes his sentence on December 3, 2013. For the reasons set forth below, we respectfully ask now that Congress permit the United States to live up to the parties expectations by maintaining an exception to the transfer restrictions in S. 1197, the NDAA that would allow Noor, like the men before him, to be released at the conclusion of his sentence and, in so doing, further the integrity of the military commission system..

HISTORY OF RELEASE AFTER COMMISSIONS SENTENCE COMPLETED

Historically, the United States has released detainees at the completion of the military commission process. In each case, the scenario has been slightly different, but the underlying release decision has been principled. In the cases of negotiated agreements, the parties explicitly bargained for release or for meaningful consideration for release, resulting in the creation of a credible and legitimate system where the expectations of both parties are satisfied. The United

States has never attempted to hold an individual indefinitely beyond the expiration of their commission's sentence.

- Ibrahim al Qosi – Pled guilty pursuant to an agreement. Released to Sudan (his home country) after his sentence was completed. As a result of the FY12 NDAA exception for pretrial agreements, no certification required.
- Omar Khadr – transferred to Canada pursuant to terms of an agreement.
- Salim Hamdan – returned to Yemen at completion of commission's sentence.
- David Hicks – returned to Australia pursuant to an agreement.

Notably, according to publically available information, all of these men are currently living peacefully in their home countries.

BACKGROUND OF THE PTA EXCEPTION IN FY12 NDAA

Noor began negotiating a potential agreement with the Government in 2009. At the time, there were no congressional restrictions on the transfer of Guantanamo detainees, particularly those who had completed their sentences. At the time Noor entered into his agreement, the United States had successfully repatriated three men after completion of their sentences. The Government and Noor relied in good faith on this record of success in reaching the terms of Noor's agreement. Noor pled guilty in February 2011 pursuant to a pretrial agreement (PTA) to Material Support for Terrorism (MST) and Conspiracy to commit MST. At the time of his plea all parties reasonably believed that he would have a meaningful opportunity to be considered for release and repatriation to Sudan at the conclusion of his sentence.

Congress, in §1028 of the FY-12 NDAA, recognized the special circumstances where detainees pled guilty in military commission and entered into agreements with the expectation that those agreements would, at the very least, result in the case being forward to the Secretary of Defense (SEC DEF) for consideration for repatriation. Specifically, §1028 provided an exception to the general certification requirements in order to "effectuate - a pre-trial agreement entered in a military commission case prior to the date of the enactment of this Act."

The exception for agreements was inserted into the FY12 Act as a direct response to considerations related to Mr. al Qosi and Noor – both men from Sudan and both men serving sentences pursuant to agreements. As a result of the pretrial agreement exception, the SEC DEF was not required to provide congressional certification --- a provision critical in these two cases because without the exception transfer would have been barred by the first prong of the certification requirement banning transfers to state sponsors of terrorism. The exception in FY 12 provided a great deal of legitimacy to the commission process and facilitated movement forward in the process.

The necessity for a specific exception to facilitate release in this narrow category of cases remains vital today not only to honor Noor's agreement but also to reinforce the integrity of the commission system. In that regard:

1. Noor has served nearly 30 months of his 34 month agreed upon sentence (receiving no credit for his past 9 years of incarceration).. He remains at Camp 5 in maximum security conditions and in virtual solitary confinement. Despite these harsh conditions of confinement, and consistent with his long history of compliance, Noor has fulfilled all of his promises contained in his agreement with the Government including a more involved cooperation agreement than any of those released before him.

2. The past model of agreements in the commissions contained little in the way of cooperation requirements. The other detainees listed above (Qosi, Khadr, Hicks, Hamdan) either had no obligation to cooperate with the U.S. government or a limited requirement that was easily fulfilled. By contrast, Noor's PTA is typical of the form of future of plea agreements in the commissions. It required ongoing and robust cooperation spanning over the entire period of his sentence. It is crucial that when the United States receives such a benefit, it honors the reasonable expectations of the performing party with whom it negotiated...

3. The legitimacy of the military commissions depends upon the United States fulfilling its promises made in pretrial agreements. A promised term of months or years for a sentence is rendered meaningless if it results only in movement between camps at Guantanamo. A just and fair process should include referral of the case to the SEC DEF for consideration for repatriation of the individual at the conclusion of his sentence. Apart from satisfying its contractual obligations, this helps the United States government:

- o receive the benefit of cooperation / intelligence / testimony from detainees;
- o avoid lengthy, costly trials that involve a substantial amount of classified material;
- o maintain legitimacy in the global community; and
- o adhere to American and international standards for fair trials

In Noor's case extreme injustice would result if he were not considered for repatriation to Sudan. An important concept of any legitimate criminal system is that it treat similarly situated individuals the same. Without distinguishing between the underlying facts in their cases and looking solely at the process, Noor's case is nearly identical to Mr. al Qosi's. Both men pled guilty to the same crimes and had similar agreements. The one substantial difference between their agreements is that Mr. al Qosi had a much more limited cooperation obligation. Both men are from Sudan. As such, the transfer restrictions in the existing NDAA for FY-13 and the HASC proposal for FY-14 prevent repatriation. Only as a result of the PTA exception in the FY-12 legislation was Mr. al Qosi able to return to Sudan.

RELEASE TO HOME OF ORIGIN

Not only is it in Noor's best interests to be released and returned to his home of origin, Sudan, it is in the best interests of national security.¹ Sudan has had an exceptional and flawless record of receiving detainees and integrating them back into society. It has a model program which addresses the complex issues involved, from physical and mental health rehabilitation to assistance in finding a job. Additionally, it has a proven successful system of accountability and monitoring. There have been a total of 10 former detainees released to Sudan, all of whom have been living peacefully.

In addition to the support from the government of Sudan, Noor has the support of his family which has a plan in place for his arrival. He will live with his brother and his family for a period of time until he is transitioned and can move into the house that his family has built for him. The area in which his family lives in the Northern part of Sudan, called Port Sudan, is a peaceful place. Noor is part of the Mikal tribe which will provide a wide network of support upon his release. There are plans in place for a job and a family.

According to experts, and supported by example, the Sudanese reintegration program is excellent. During Noor's sentencing trial, we utilized the assistance of a psychiatrist, Dr. Jess Ghannam, who has worked with former detainees in several countries and has assisted with the design and implementation of several rehabilitation programs. His opinion is that Sudan is among the best. According to Dr. Ghannam, it is much preferable to return a detainee to his home of origin rather than a third country. It is only in the home of origin that the individual receives the family, cultural, and community support most important to a successful release.

Additionally, it is well within the purview of the Secretaries involved in the transfer decisions to analyze each individual case with an eye toward what is best for national security. A blanket legislative prohibition against transferring Noor to Sudan would make this function illusory.

S. 1197 – Issue #1

Section 1031 of S. 1197 addresses transfers of detainees. Its intent appears to be to create a path whereby the United States can honor the outcome of the military commission process. However, § 1031(a)(3) requires some amendment to ensure that when both parties agree that the detainee has successfully completed the commission process, the government has the tools to abide by the outcome of that process.

In Noor's case, there has been a change in the law since his plea in February 2011. In *Hamdan v. United States (Hamdan II)*, the D.C. Circuit held that material support (MST) offenses are not triable by military commission if committed prior to the enactment of the 2006 Military

¹ Unlike the House version of the NDAA, the Senate version would not prohibit return to Sudan. It is critical that a blanket exclusion not be included in the final version of the NDAA. The enactment of such an exclusion unduly limits the discretion of the Secretary of Defense and ignores Sudan's past successes at reintegration.

Commissions Act. *Hamdan II*, 696 F.3d 1238, 1252-53 (D.C.Cir. 2012). Noor pled to both MST as well as conspiracy to commit MST. The convening authority has not yet taken action on Noor's sentence, but there is a possibility that the convening authority will not approve the findings and sentence based on *Hamdan II*. If the congressional intent of Section 1031 of S. 1197 is to provide a framework for the government to honor the outcome of the commission process, some amendment of §1031(a)(3) is required.

SOLUTION TO ISSUE #1

Amend § 1031(a)(3) as follows:

(3) such individual has been tried in a court or competent tribunal of the United States ~~having jurisdiction~~ on charges based on the same conduct that serves as the basis for the determination that the individual is an enemy combatant and —

- (A) has been acquitted of such charges; or
- (B) has been convicted and has completed serving the sentence pursuant to the conviction; *or*
- (C) *has served a substantial portion of an agreed upon sentence when an appellate ruling mandates post trial action disapproving the sentence.*

Or, if it becomes apparent that the full spectrum of options currently listed is not realistically possible as an option, then at a minimum, the following should replace the existing (a)(3):

(3) the Secretary determines, following a trial, that an appellate ruling mandates a post trial action disapproving the sentence and the individual has served a substantial portion of an agreed upon sentence.

S. 1197 – ISSUE #2

Section 1031(b) lists factors that SEC DEF must determine and §1031(c) lists factors to be considered in making the release determination. There is no guidance provided to SEC DEF regarding which individuals should be considered for transfer. It is possible that an individual will participate in the military commission process and complete that process to its logical end – whether by acquittal, completion of sentence, or some other outcome --- and have no process in place for referral to SEC DEF for release consideration. Instead, the individual faces the prospect of being returned to the general population and forced to wait at the end of the line for an opportunity to present his case before a Periodic Review Board (PRB) without any credit for his past participation in the commission process. Not only would that be unfair, but it would delegitimize the commission system, waste valuable resources, and do nothing to further the President's stated goal to close Guantanamo.

SOLUTION TO ISSUE #2

Individuals who plead guilty or are found guilty after a commission trial should be promptly considered for release. The certification requirement should be clarified to require that the SEC DEF promptly consider post-commissions detainees for certification and release.

CONCLUSION

Noor entered into an agreement with the United States Government in good faith. He has lived up to his end of the deal. We ask that Congress permit the United States to live up to its end by maintaining an exception to the transfer restrictions that would allow Noor, like those before him, to be released in December 2013 at the conclusion of his sentence.

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STATEMENT of Sabin Willett

Submitted to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights ("Subcommittee") in connection with its July 24, 2013 hearing on amendments to the 2013 National Defense Authorization Act ("NDAA") relating to the prisoners held at Guantanamo Bay, Cuba.

I am a partner at the law firm of Bingham McCutchen LLP. I have been active as *pro bono* habeas counsel, in one way or another, on behalf of prisoners at Guantanamo Bay since 2005. I am grateful for the opportunity to submit this statement to the Subcommittee in connection with its consideration of those provisions of the NDAA that relate to the prisoners held at Guantanamo Bay, Cuba.

Tonight in ball parks across America we will sing our national anthem, breaking into cheers when we reach the crescendo. We will say, as we like to do in July, that we are the land of the free, and the home of the brave.

The rest of the world is puzzled by these words, for it knows that we are the land of Guantanamo Bay -- that we are the land that imprisons, into a second decade, men who have committed no crime and have been "cleared for release." It knows that we are the land where, when prisoners, sensibly concluding that they will never know freedom, simply want to die peacefully, we shackle them to a chair, and force tubes into their nostrils. So we are not the land of the free. We are the land of state security.

We need to be honest with ourselves about this, for the rest of the world knows it.

The masters of Guantanamo Bay can hardly boast, either, about being the home of the brave. The America that held German prisoners of war in Texas, and Italians in Boston, and released them after three years -- that was the home of the brave. Today we are frightened of men who were foot soldiers, if they were anything at all, in an Afghan civil war a decade ago. They never broke any law. Most didn't engage in terrorism, or even battle. If we are still afraid of them, or if we are still using them as pawns for electioneering purposes, then we are not the home of the brave.

The world knows this too. So if we are going to be honest, we need to do something real about Guantanamo, or else amend our anthem, and sing that we are the land of state security, and the home of the timid. I prefer the anthem the way it is. But our government has made its words false, and we the people have let them do it.

Since 2009, our representatives in government have been parochial, small-minded, willing to use prisoners of war as political pawns. In Congress you enacted "gotcha" NDAA certification provisions for political reasons. The President flinched from his responsibilities, afraid of the "gotcha." He blamed Congress. Congress blamed back. Very few of you have stood up even for a ban on force feeding. Most of you closet with your consultants and pollsters about how the game can be played with your base and in the next election. And the prisoners remain, as they have been for years, pawns of the game.

Please stop. If you need to think about anything beyond the words in our national anthem, think of how history will view the country we put you in charge of, and how it will view your stewardship. Holding foot-soldiers for a decade -- and four years after they are "cleared?" Leaving men in prison so long they will starve themselves just to die peacefully? History will not ignore these things. It will not fail to make judgments about the people who did them.

You should direct the President to use all deliberate speed to close the base, by transferring to U.S. prisons all persons charged with war crimes, and transferring to home or third countries everyone else. You should also ban the force feeding of any competent prisoner. You should do those things right away, by separate legislation.

If you are unwilling to do them, there is an alternative that would at least be a start. You can endorse the President's *immediate* release of military detainees as he sees fit in managing the armed conflicts that you have authorized. Article II, section 2 of the Constitution gives him that power anyway, but you should make your support clear. This would be a simple matter. You could accomplish it by abolishing NDAA section 1028, or by adding to NDAA section 1028 a provision that creates as an alternative certification the following:

"NDAA section ____ Notwithstanding the foregoing, whenever in his discretion as Commander in Chief the President determines that the continued exertion of military force against a detainee, wherever held, is no longer warranted by, or would be inconsistent with the President's military judgment in connection with

pursuit of a favorable outcome to an armed conflict duly authorized by Congress, the President may so certify to the Congress, and in connection therewith cause the immediate release of the detainee outside the territory of the United States.”

The latter amendment would break the logjam, and show that at last the Congress and the President are working together to accomplish the country’s business. It wouldn’t go all the way to where you should go. But it would go a fair way toward giving us back a national anthem that we can sing without embarrassment.

Sabin Willett



My name is Peter Ellis. I'm a former senior trial partner and currently "of counsel" at Foley Hoag LLP, a law firm with offices in Boston and Washington, DC. I represent two young Yemenis – Walid Zaid and Mohammed Haidar - - who have been unjustly imprisoned at Guantanamo Bay for more than 11 years. That period spans their entire adult lives.

Neither Walid nor Mohammed has ever been accused by our government of doing anything criminal or even morally wrong. Neither has ever been a terrorist, nor been classified as such by the government. They are not "radical Islamists": in fact, like most young men from very poor backgrounds, they are quite apolitical. In the course of many long, wide-ranging discussions, I have never heard either express anti-American sentiments. There is no evidence in the classified intelligence reports I have seen that they have ever done so.

Walid and Mohammed have both told me that they had very positive views of America before their detention. They saw it as a land of both liberty and opportunity. Now, they simply express utter bewilderment. How, they ask, can America imprison me, possibly forever, when I've done nothing wrong? Why is America depriving me of the chance to get married, have children, see my ageing mother and other relatives, to do something useful with my life? If I did something wrong, why haven't I been given a trial? If not, why am I still here? Why did Obama promise to close Guantanamo and then not do so?

The only reason that Walid and Mohammed were sent to Guantanamo in the first place is that Donald Rumsfeld – overruling the case-specific recommendations from on-the-ground military interrogators – decreed that all Arabic-speakers detained in Afghanistan or Pakistan should be sent there. The only reason they are still there (when hundreds of other young men have been sent home) is that they are citizens of Yemen.¹

Several years ago, shortly after the Christmas Eve bombing attempt, President Obama decreed that there would be no further repatriations from GTMO to Yemen. Despite Yemen's active cooperation with the U.S. and significant progress in combating AQAP, that policy remains in effect. The result: more than 50 legally and morally innocent young men are being held indefinitely in a maximum security prison solely by reason of their national origin. Is this consistent with American values?

There are at least two possible ways out of the morass we have created at Guantanamo. The first would be to promptly re-start the process of repatriating the cleared Yemenis to their own country. The second would be to ensure resettlement, with appropriate support, in another country.

The administration's reason for not repatriating any of the Yemenis who have already been determined by its own

¹ Both men, like many other Yemenis imprisoned at Guantanamo, were approved for release or transfer by the unanimous recommendation of the Interagency Task Force established by President Obama in 2009 and which completed its work in early 2010.

national security experts not to pose a significant security risk essentially boils down to this: “well, we could be wrong, and one, or two, or three of these people might end up doing something bad after they’re sent home. So we’ll just keep all 50-odd of them locked up until the war on terror is over.”

That rationale is legally and ethically indefensible. If it were logical, the U.S. should never free any of its domestic prisoners even at the end of their sentences, because some of those released may reoffend. The cleared Guantanamo prisoners, by contrast, have never been charged with any crime, must less convicted, and have been affirmatively determined not to have engaged in acts of terrorism.

A minority of those held at Guantanamo profess or have manifested by conduct extreme ideological or anti-U.S. views. But these men are not among the group cleared for transfer or release: such views would have disqualified them from a favorable determination by the Interagency Task Force. The others, including my clients, are no more politicized or extreme in their religious beliefs than the average U.S. citizen. Understandably, after more than a decade in prison, they simply want to be reunited with their families and to get on with what remains of their lives. They do not pose a significant security risk.

Insistence on “rehabilitation” depends on what is meant by that word. Forcing people to listen to months of lectures on religious topics is unlikely to prove productive: those who are not religious zealots will be bored and regard

attendance as a waste of time, while anyone who secretly harbors extreme views (and has managed to completely hide them for over a decade) will not be persuaded.

The real key to rehabilitation is economic: what drove young Yemenis to leave their country for Afghanistan or Pakistan in the first place was extreme poverty and the unavailability of employment. Jobs are the best predictor of good future behavior, and it would behoove the administration to work cooperatively with the Yemeni government to ensure that repatriated detainees are able to find stable employment. Given that it costs c. \$900,000 per man per year to keep someone at Guantanamo, while the average yearly income in Yemen is between \$2,000 and \$3,000, the arithmetic is simple. If the U.S. is genuinely concerned about “risk”, it should offer economic support to ensure future employment.

Potential resettlement of cleared detainees in countries other than their native land will require more than renewed diplomatic efforts: success at that task will require Congress to change current law. Previous resettlement efforts were acutely hampered by the unwillingness of the U.S. to accept even a single Guantanamo detainee, no matter how innocuous his past. Foreign governments understandably inquire why, if particular detainees have been judged not to present a material security risk, the U.S. is unwilling to accept any of these men. If we suggest that elected U.S. officials regard doing so as too much of a political risk, our allies respond by asking why they should risk a similar response from their own politicians or public.

Any diplomatic effort to find new homes for men released from Guantanamo is likely to founder unless and until the U.S. itself decides to accept some modest number (perhaps 5-8). These men could (and should) be carefully vetted in advance, we should take steps to ensure that they are able to find employment once here, and it is reasonable to subject them to some degree of surveillance and travel restriction for a period of some years. It is clear that such men would be able to find civilian sponsors in this country, including communities willing to accept them, and that such practical and moral support would further minimize any theoretical risk they are deemed to present.

If the current legal barrier to resettlement in the U.S. of a limited number of Guantanamo detainees is removed, and the administration is permitted to devise a rational plan for doing so, it is highly likely that other nations would follow suit. For that reason, I and other detainee counsel strongly urge approval of such a change in the law.²

Based on my own travels and communications with friends and legal colleagues overseas, I can attest to the tremendous damage that the continued existence of Guantanamo has done and is still doing to our international prestige. The U.S. is rightly viewed as betraying its own stated values, and perceived as hypocritical whenever it condemns human rights abuses in other countries. Prompt

² In private discussions between detainee counsel and foreign governments over the past five years, U.S. unwillingness to accept any released Guantanamo detainees has been repeatedly cited as the single biggest barrier to other nations' willingness to help out.

and effective steps to close the prison at Guantanamo are essential to any effort to restore our international prestige.

In closing, I'd like to emphasize that the views expressed above are not those of a "bleeding heart liberal". My wife and I are independent voters who were born into staunchly Republican families from whom we acquired our core values. My father was a career military officer who fought in both World Wars, and I served proudly in the U.S. Navy. I first visited Guantanamo more than 50 years ago, in the era of the Cuban missile crisis, when it was still a thriving naval base and a vital part of our defense readiness.

I write, moreover, not simply in the interest of my clients, but as a citizen vitally concerned with the long-term best interests of this country, and as a lawyer committed by oath and training to defending the values enshrined in our Constitution. History teaches that fear and the irrationality that so frequently attends fear are the greatest threats to democratic and humane values. It is time for Congress to move beyond vague and unfocused fears, and to work on crafting constructive, bipartisan solutions that will put the mess at Guantanamo behind us, once and for all.

To the Honorable Senator Durbin and members of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights:

Thank you for addressing the problem of Guantanamo.

Since 2007, I have represented a Syrian man, Ahmed Adnan Ajam, identified as ISN 326, a prisoner in Guantanamo for over 11 years. Ahmed is one of the 86 men deemed not a threat to our country and cleared for release.

Last communication I received from Ahmed in May, he told of giving up his hunger strike of 67 days as he could no longer stand the force feeding, his problems with sleeping because of the constant noise, the full “sexual” search his neighbor had been subjected to four times just to receive phone calls, his isolation, and a request for medical care that he did not receive.

I was happy to hear from him. Once the courts ordered the government to give the Guantanamo men access, the costs and logistics of flying to Guantanamo (with hired interpreter), made and still make my in-person trips difficult and therefore rare. We write letters, but an exchange of letters can take weeks due to the vetting requirements. We will not be able to speak on the phone until the intrusive body searches are no longer in effect. So Guantanamo has served its original purposes to isolate, hold beyond the law, and 11 years later, push these men outside our collective consciousness. Thank you for bringing this issue to the fore.

Despite the difficulties and expense, I have traveled to Guantanamo and met with Ahmed a number of times. In addition to talking about his habeas corpus case, we talk about personal things. We talk about our families. We talk about philosophy and religion. We talk about his plan to start an export business after he gets out of Guantanamo. I cannot talk to him about Democracy, the wonderful, generous spirit of Americans, and the high value we place on justice and fairness. He has seen only the opposite these 11 years. We must transcend the pain of 9/11 to let the scales drop from our eyes. We can no longer morally imprison men like Ahmed, who had no part in 9/11, did not talk up arms against the United States.

By now, you have probably already heard much testimony about the futility of pursuing a habeas corpus case in federal court. As a result, this is an issue Congress and the President and the American people must resolve – together. Remove the Congressional barriers for transfer in the National Defense Authorization Act, work with the President to make it a priority to release and resettle those deemed not a threat to the United States or charge with a crime all those incarcerated in Guantanamo. This makes sense from a National Security, American values and humanitarian perspective.

Guantanamo is a stain on our nation. Please do your best to remove it.

David Marshall
Seattle, WA

STATEMENT ON BEHALF OF AMNESTY INTERNATIONAL USA

SUBMITTED BY ZEKE JOHNSON, DIRECTOR, SECURITY & HUMAN RIGHTS PROGRAM

**Closing Guantanamo:
The National Security, Fiscal, and Human Rights Implications**

Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

**UNITED STATES SENATE
JULY 24, 2013**

1. INTRODUCTION

Mr. Chairman and members of the Subcommittee, I am honored to submit this statement for the record on behalf of Amnesty International USA. For more information about Amnesty International's concerns and recommendations please refer to our report, *"Guantánamo: A Decade of Damage to Human Rights."*

Amnesty International is a worldwide human rights movement with more than 3 million members and supporters in more than 150 countries and territories. Amnesty International's vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. The organization is funded by individual members; no funds are sought or accepted from governments for investigating and campaigning against human rights abuses.

2. "GLOBAL WAR" & GUANTÁNAMO

"From our use of drones to detention of terrorism suspects, the decisions that we are making now will define the type of nation – and world – that we leave to our children."

-President Barack Obama, 23 May 2013

In a landmark speech delivered on May 23, 2013, President Barack Obama revisited his administration's framework for US counter-terrorism strategy four years after a similar address he gave early in his first term. While there were encouraging signs in the recent speech, the continuing absence of international human rights law from this framework remains a cause for concern.

In neither speech did President Obama make any express reference to human rights. This is regrettable, not least given that his administration's National Strategy for Counterterrorism has "respect for human rights" as a "core value" underlying all counterterrorism policies. The National Security Strategy and the National Strategy for Combating Terrorism issued during the administration of George W. Bush had said much the same thing, but the human rights of

detainees in US custody were systematically violated nonetheless. Words are one thing, actions another. Despite their positive aspects, President Obama's words leave a lot to be desired, and it remains to be seen how much will change, and how quickly, after this latest national security speech.

In his 2009 address, President Obama fully endorsed the flawed theory that the USA had been engaged in a "global war" since the attacks of September 11, 2001: "Let me be clear," he said then, "we are indeed at war with al Qa'ida and its affiliates." In his latest speech, he did so again: "We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qa'ida, the Taliban, and their associated forces." As Amnesty International has long pointed out, the broad congressional authorization to which he refers – the Authorization for Use of Military Force (AUMF) – was passed after little substantive debate as well as apparent confusion among members of Congress about what they were voting for, and the resolution has been exploited over the years to justify a range of human rights violations.

In his latest speech, however, President Obama did raise the prospect of a change in approach to meet what he said was the changing nature of the terrorist threat, from a trans-national al-Qa'ida capacity to more localized affiliates operating within specific countries and regions, as well as the threat posed by "homegrown extremists" in the USA. As an additional reason for a rethink, President Obama pointed to the 2014 withdrawal from Afghanistan of US combat troops after a dozen years there. Beyond Afghanistan, he asserted, "we must define our effort not as a boundless 'global war on terror,' but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America." Every war, he said, "has to come to an end" and in this regard the USA was "at a crossroads" requiring it to "define the nature and scope of this struggle, or else it will define us."

Amnesty International has long called for the USA to jettison its flawed "global war" framework (and for withdrawal of the AUMF as a clear congressional message of the need for a fresh start). The organization urges that this happen now, not at some still undetermined point in the future. President Obama said that he was looking forward to "engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further." However, the administration does not need to wait for Congress to act, but can immediately and publicly announce that it will from now on fully meet the USA's international human rights obligations under a legal framework consistent with international law that should have been applied from the outset of the post-9/11 response.

But the "war on terror" – whether in name or notion – has already come to define the USA's approach to national security, and this slate cannot be wiped clean so easily. For the USA to redefine itself – to begin to live up to its own ideal of a global human rights champion – will require more than just redefining the nature and scope of the struggle against terrorism. There must also be truth, accountability and remedy in relation to the human rights violations, including crimes under international law, that have been committed by US forces in the name of this "global war." Failure to account for the past will leave the USA not only stained by this part of its history, but more susceptible to repeating it.

President Obama referred to "the rule of law" several times in his 2009 and 2013 speeches. In the latter, for example, he reiterated that under his predecessor, "we compromised our basic values – by using torture to interrogate our enemies, and detaining individuals in a way that ran counter to the rule of law." He repeated that his administration, in contrast, had "unequivocally banned torture" and had "worked to align our policies with the rule of law." What the world has

learned since 2009 (as it had learned once before during the Bush administration) is that a promise by the USA to abide by the rule of law should not yet be taken as a commitment that it will meet its international human rights obligations in the counter-terrorism context. For here, it seems, the rule of law is a flexible domestic concept, the parameters of which depend on who is in the White House and how much cooperation Congress feels inclined to provide.

In May 2009, President Obama explained that he had ordered an end to the use of “brutal methods like waterboarding” for interrogating detainees because “they undermine the rule of law.” From a human rights perspective, his decision to ban the use of what the previous administration had called “enhanced interrogation techniques” – employed by the Central Intelligence Agency (CIA) against detainees subjected to enforced disappearance in a secret detention program operated under presidential authority – was a welcome step. It would have been even better if the President had made clear that torture and enforced disappearance had been crimes under international law long before September 2001 and that anyone responsible for their use would be brought to justice. His failure to use a human rights framework was not just a rhetorical failure, but the reflection of a broader policy failure and ongoing violations of international law.

In the 2009 speech, President Obama had opposed an independent commission of inquiry into the abuses against detainees committed under the Bush administration on the grounds that “our existing democratic institutions are strong enough to deliver accountability.” The intervening years have proved him wrong, but he did not revisit this matter in his recent address. Instead he altogether ignored the question of accountability for these violations. Today, the absence of accountability for crimes under international law committed by US forces during the Bush administration, and the blocking of remedy for the victims of these and other human rights violations, has left the USA in breach of its international legal obligations. This is not the rule of law. This is injustice.

The detention facility at the US naval base in Guantánamo Bay has become a byword for injustice. In 2009, President Obama endorsed the use of military commissions to prosecute some of the detainees held at Guantánamo. These would not be the “flawed commissions of the last seven years,” he said, but revised commissions brought into line with “the rule of law.” In his recent speech President Obama again endorsed military commission trials as an option for prosecutions. This time, he appeared to make this endorsement consistent with closing the Guantánamo facility – though of course still not consistent with human rights – when he said that he had asked the Department of Defense to “designate a site in the United States where we can hold military commissions.” Military commission trials held in the USA will be as unacceptable as those held at Guantánamo, as would indefinite detentions if they were to be merely relocated rather than resolved. The military commission system does not comply with international fair trial standards. Moreover, imposition of the death penalty at such trials (the Obama administration is currently pursuing death sentences against six detainees facing trial by military commission) would violate international human rights law.

The UN Human Rights Committee has stated that the trial of civilians (anyone who is not a member of a state’s armed forces) by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons,” and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.” The US government cannot point to any such rationale. It can only point to domestic politics, the same domestic politics that the administration blames for the Guantánamo

gridlock. The military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice.

In 2009, President Obama said that the standards governing the continued detention of those Guantánamo detainees whom he suggested could neither be prosecuted nor released would be brought into line with “the rule of law.” Then in 2010, the administration revealed that it had decided that there were some four dozen detainees who fell into this category, as “law of war” detainees held under the AUMF. In his 2013 address, President Obama revisited this issue a little more cautiously than he had four years earlier, and this could herald a welcome change in approach. The President referred to those detainees who “cannot be prosecuted,” including “because the evidence against them has been compromised or is inadmissible in a court of law.” He said that “once we commit to a process of closing Guantánamo I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.” Without a commitment from Congress and the administration to abide by and implement human rights principles and law, his own legacy will remain one of detentions and military commission trials – either still at Guantánamo or relocated to the US mainland – that flout the USA’s international human rights obligations.

If President Obama’s references to the rule of law in 2009 had incorporated international human rights law, the US administration would have long ago abandoned its endorsement of indefinite detention of Guantánamo detainees and military commissions as the forum in which to prosecute any of them (and an approach consistent with human rights would also have led the USA to drop its pursuit of the death penalty). Moreover, if the USA had applied human rights law from the outset, the reason Guantánamo was chosen as the location for this detention facility – to seek to keep the detainees from the US courts – would never have been countenanced. President Obama was right when he said in his latest speech that the Guantánamo detention facility “should never have been opened.” He should now recognize that in closing it, the USA should apply the long missing ingredient – international human rights law.

In his May 2013 speech, the President restated his commitment to closing the Guantánamo detention facility which he said “has become a symbol around the world for an America that flouts the rule of law.” To this end, he called on Congress to “lift the restrictions on detainee transfers” from Guantánamo, promised that “to the greatest extent possible, we will transfer detainees who have been cleared to go to other countries,” announced that he was appointing “a new senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries,” and that he was “lifting the moratorium on detainee transfers to Yemen so we can review them on a case-by-case basis.” While these moves should be cautiously welcomed, the coming days and weeks will begin to show whether or not this is another false dawn.

After all, for more than five years the US administration has been saying that it intends to close the 11-year-old detention facility. It is no surprise that many of the detainees feel a sense of hopelessness and despair at their situation of indefinite detention. As the UN Special Rapporteur on torture said on May 1, 2013:

“At Guantánamo, the indefinite detention of individuals, most of whom have not been charged, goes far beyond a minimally reasonable period of time and causes a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman, and degrading treatment.”

Shaker Aamer, who has been held for over 11 years without charge despite being cleared for transfer and despite UK Prime Minister David Cameron calling for him to be free with his wife and children in London, said back in 2005: *"I am dying here every day, mentally and physically... We have been ignored, locked up in the middle of the ocean for four years."*

Each day that passes without resolution of this situation compounds the cruelty to detainees and their families.

President Obama has blamed the failure to close the Guantánamo detention facility within his one-year deadline on the "difficult" politics surrounding "an issue that has generated a lot of political rhetoric" and made people "fearful." Attorney General Holder blamed members of Congress for the administration's U-turn on the trial of five detainees accused of involvement in the 9/11 attacks.

Under international law, domestic law and politics may not be invoked to justify failure to comply with treaty obligations. It is an inadequate response for one branch of government to blame another for a country's human rights failure. International law demands that solutions be found, not excuses. The US administration is currently telling the world, in effect, "we will resolve the Guantánamo detentions when the domestic political climate is right." The USA has not been willing to accept such excuses from other governments seeking to justify their systemic human rights failures, and it should not be accepted when it is put forward by the USA.

3. RECOMMENDATIONS TO THE US GOVERNMENT

- **Ensure justice and security with human rights:** Those responsible for the attacks in the USA on September 11th, 2001, attacks that deliberately targeted civilians and which Amnesty International has repeatedly condemned as a crime against humanity, should be brought to justice through fair criminal trials without recourse to the death penalty, as should anyone responsible for carrying out or planning further such attacks. This is a realistic aim that can and should be achieved through cooperation between states in accordance with their international obligations.
- **Address the Guantánamo detentions as a human rights issue.** The detentions must be resolved and the detention facility closed in a way that fully complies with international human rights law. Specifically:
 - Pending resolution of the detentions, and without delaying that goal in any way, there should be an immediate detailed review of conditions of detention and of policies implemented in response to the hunger strike, including assessing cell-search, force-feeding and comfort item policies, facilitating continuing access for legal representatives to detainees, allowing full access to independent medical professionals, UN experts, and human rights organizations, and ensuring all policies comply with international human rights law and standards and medical ethics.
 - Expedite safe detainee transfers: Dozens of the Guantánamo detainees have long been "approved for transfer" by the US authorities. Particularly now that President Obama has lifted the moratorium on repatriation of Yemeni nationals, as the Chairperson of the Senate Intelligence Committee had recently urged, the administration and Congress should bring about lawful and safe detainee transfers as a matter of priority. The USA should not place any conditions on transfers of detainees that would, if imposed by the receiving government, violate international human rights law and standards.

- Charge and try in civilian courts: Detainees who are to be prosecuted should be charged and tried without further delay in ordinary federal civilian court, without recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released.
- **Immediately drop the “global war” framework.** The message sent by the USA’s global war framework is that a government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it decides that the circumstances warrant it. Under its global war framework, the USA has at times resorted to enforced disappearance, torture, secret detainee transfers, indefinite detention, and unfair trials, as well as a lethal force policy that plays fast and loose with the concept of “imminence” and appears to permit extrajudicial executions. At the same time, truth, accountability and remedy have been sacrificed. Congress and the administration should commit to a framework for US counter-terrorism strategy – from detentions to the use of force – that fully complies with international human rights law and standards. The 2001 Authorization for Use of Military Force should be repealed.
- **Ensure necessary investigations.** Ensure prompt, thorough, independent, effective and impartial investigations into all credible allegations of human rights violations, with the methodology and findings of such investigations made public.
- **Ensure full accountability.** Ensure that anyone responsible for crimes under international law, including torture and enforced disappearance, committed in the post-9/11 counter-terrorism context is brought to justice, regardless of their level of office or former level of office.
- **Guarantee access to remedy.** Ensure that all victims of US human rights violations are recognized, and have genuine access to meaningful remedy, as required under international law.
- **End any use of secrecy that obscures truth about human rights violations or blocks accountability or remedy for violations.** Any information that describes or details human rights violations for which the USA is responsible must be made public. Among other things, such information relating to the identity, detention, interrogation and transfers of those held in the now terminated CIA programs of rendition and secret detention should be declassified and disclosed, including in the context of trial proceedings being conducted against detainees currently held at Guantánamo, and in relation to the report on the CIA detention program finalized by the Senate Select Committee on Intelligence in December 2012. The USA must end any use of the state secrets doctrine that blocks remedy or accountability.

STATEMENT FOR THE RECORD TO THE SENATE JUDICIARY COMMITTEE HEARING TO REVIEW OPTIONS
FOR THE CLOSURE OF THE GUANTANAMO BAY DETENTION FACILITY
17 JULY 2013

Thank you for the invitation to provide a statement to this committee as you examine options for closing the Guantanamo Bay detention facility. My name is Michael Lehnert. I retired from the Marine Corps on 1 January 2010 as a Major General after thirty seven years of service. In 2002 I was directed to form and lead the first Joint Task Force to Guantanamo and establish the detention facility. My statement will deal with the early decisions leading up to the establishment of Guantanamo and provide a strong recommendation regarding why the facility should be closed forever. My statement is based entirely upon open source material and my personal recollections from a decade ago. I kept no personal notes during my time in Guantanamo because I did not want to commit a security breach. To the best of my knowledge none of the information that I am providing is classified.

When terrorists attacked the World Trade Center and the Pentagon on the 11th of September 2001, I was a newly promoted Brigadier General and had been in command of the 2nd Force Service Support Group (2nd FSSG) at Camp Lejeune, North Carolina. This 8,000 person force consisted of the support personnel necessary to provide logistics, engineering, military police and medical support for the 2nd Marine Expeditionary Force. The 2nd FSSG had several contingency missions—one of which was to be capable of immediately deploying in the event of a migrant crisis. This had occurred several times in the past and in 1995 as a colonel, I had deployed to command the thirteen migrant camps in Guantanamo Bay during operation Sea Signal. During that time I was responsible for the security and care of about 18,000 Cuban and Haitian migrants. In sum, in the view of the Pentagon, my unit had the capability and I had the experience necessary to set up and run a detention facility for terrorists.

Ironically, the U.S. Army actually has the doctrinal mission to run enemy prisoner of war camps, not the Marine Corps. However in the aftermath of 9-11, no Army command was prepared to deploy and meet the timelines required by the Administration. Since the 2nd FSSG was force listed to support other contingency missions, it was selected to deploy with the understanding that the duration of our deployment would be limited to 60 days whereupon we would be replaced by an Army led Joint Task Force. In reality the duration of the deployment was approximately 90 days.

In the period following the attack on the Pentagon and the World Trade Center, Americans and our political leaders experienced a wide range of emotions and pressures. The electorate expected the Administration and Congress to “do something” and with the decision to strike the al Qaeda (AQ) training camps in the fall of 2001, the wheels were set in motion for Guantanamo. The decision to invade Afghanistan to take out the AQ training camps and topple the Taliban regime was probably the correct one for the time. What was not anticipated was the number of non Afghans our troops encountered on the battlefield. Many had joined the Taliban or AQ to be trained as terrorists but others were simply in the wrong place at the wrong time. The challenge to U.S. forces was sorting them out. Most of those captured said they were simply studying in a Madrasa. Ironically, for some this was accurate. For others it was a cover story. Our troops had little cultural or linguistic knowledge and often relied heavily on the word of rival tribal leaders who happily settled scores by selling out their ancient rivals or foreigners for money.

As the conflict progressed, U.S. forces began to collect more and more combatants and individuals whose presence was hard to explain. Many were wounded and appropriate facilities and security in Afghanistan was scarce or nonexistent. Weather was deteriorating. Medical support was

limited and U.S. commanders on the ground felt they had a growing humanitarian and security problem on their hands. At the same time, the intelligence community believed that these prisoners represented an intelligence bonanza if they could just be taken somewhere where they could be safely interrogated.

The Administration turned to Guantanamo. This wasn't the first time. Previous Administrations have used Guantanamo for the flotsam and jetsam of U.S. foreign policy because it occupies a unique extra-legal option. In times past it has been used to detain migrants from various Caribbean countries and elsewhere while their status was "sorted out".

As I watched events unfold from Camp Lejeune and with the information coming back from Afghanistan because I already had members of my command in that conflict, I instructed my staff to begin planning in the event we were told by the Administration to set up detention facilities in Guantanamo Bay.

On the 22nd December 2001 I was ordered by the Pentagon through the chain of command to fly immediately with key members of my staff to Guantanamo Bay Cuba and to develop an initial concept of operations for creation of a full scale detention facility for prisoners that would be transferred from Afghanistan to Guantanamo. Little further guidance was provided at the time other than that the facility must be able to hold up to 3,000 prisoners. I was instructed to have the concept back to the Joint Staff in 48 hours, leave Guantanamo and return to my home station.

In the ensuing days covering the Christmas and New Years' holidays the guidance changed almost hourly. While we were not privy to it, there seemed to be a serious disagreement within the Administration on the shape and purpose of the detention facility at Guantanamo. Was it to be simply a detention facility or an interrogation facility? What standards were to be used? How many detainees would be sent? There was a vigorous and ever changing discussion on what to call them. Originally referred to as enemy combatants, then enemy prisoners of war, we were instructed to simply refer to them as "detainees". There was clearly little consensus regarding the detention status and legal rights of the prisoners whose transfer to Guantanamo was anticipated. Ultimately, we were told that the detainees had no rights of habeas corpus and that the Geneva Conventions would not apply because the Taliban was considered a failed state, the AQ operatives were non-state actors and international law had no binding legal effect on either the President or the military because it was not federal law as recognized by the Constitution." At the same time, lawyers within DoD raised serious and legitimate concerns about this guidance fearing among other things the precedent and risks it would create for our own troops in this and in future conflicts. These unresolved legal battles had far reaching consequences.

Ultimately I received ambiguous instructions to "be guided by but not bound by the Geneva Conventions". I privately resolved to strictly adhere to the Geneva Conventions for the treatment of enemy combatants and instructed my entire staff to read the Geneva Conventions. I told them that the decision to deviate from any of the Conventions was a decision only I could make. For practical reasons I did not implement four of the conventions. We did not pay the detainees (either in Swiss Francs as required by the Conventions) or in any other form of currency, we did not heat their cells as called for in the conventions as it was a tropical climate and we didn't allow them musical instruments—another requirement. The Conventions also required those being detained to be provided housing that is equivalent to that provided to Security Forces. We didn't do that. We also did not conduct Article 5 hearings though I requested permission to do so and was denied. Ironically as a consequence of the

Supreme Court decision in *Hamdi vs Rumsfeld*, DoD ultimately directed the military to hold Combatant Status Review Tribunals ("CSRTs") in 2004 to correct the original failure to hold Article 5 hearings.

I was also told to build the facility "out of sight of the Cubans who occupied the high ground outside the Naval base and in such a manner that the detainees "could not see the ocean". After telling the Joint Staff that no such place in Guantanamo existed, the order was rescinded but it is an example of the kind of guidance I was receiving.

On Friday afternoon 4 January 2004, the order came to form and deploy JTF 160 from numerous commands across the United States to Guantanamo Bay Cuba and construct a detention facility. I was to have the first 100 cells ready for receipt of prisoners within 96 hours of receipt of the order. In other words, we had to form a brand new organization, deploy a force and build a jail in four days. We did it in 87 hours but it drove many of the decisions that were to haunt us for months after.

We made the decision to set up the facility in the location known as X-Ray. X-Ray had been the camp reserved for migrants in previous times who either arrived at GITMO with known criminal pasts or who had committed some sort of offense requiring their detention and isolation from the rest of the migrant community. Many stories about how the facility came to be called X-RAY surfaced but the truth is prosaic. When we were building migrant camps for Cubans and Haitians in the 90's, we had no way of knowing how many camps would be required. We began naming them according to the military phonetic alphabet beginning with "Alpha, Bravo" and so on. It was decided that the facility for the bad actors needed to be at the other end of the alphabet and for obvious reasons, "Yankee and Zulu" were unacceptable. X-RAY was born out of the migrant crises of the 90's. It was located in a remote area of the base near the Northeast Gate to facilitate deportation back to Cuba. It was relatively easy to secure and had power and water (always a problem at GITMO) to the facility which had been allowed to deteriorate in the Caribbean climate.

The deteriorated X-Ray facility was dozed and 100 8 by 10 foot cells were constructed out of anything we could get our hands on. Most of the fences at GITMO other than the one separating us from the Cubans were torn down and used to make cells within the time frame established by the Administration.

However the location of X-Ray and the construction of the cells were problematic. The footprint of the facility was limited by geography and no more than 300 cells could be constructed there. The open design of the cells made it easy for detainees to coordinate their actions to talk to one another. It was in full view of anyone who could get close enough and required enormous manpower to maintain. It also looked bad. The cells resembled cages. It was clearly a temporary solution driven by the amount of time we'd been given.

Almost immediately we began planning to build a more secure facility at Radio Range. Radio Range had been the site of the more permanent migrant camps. It would have been the optimal site for the original facility had we been given more than 96 hours. We began designing pre-fabricated structures made from shipping containers. These were built off shore where there was more access to labor and shipped to GITMO via barge but this came later and during my entire time at GITMO we had to work with the limitations of X-RAY.

The first detainees arrived on the 11th of January 2002. We were told that the first shipment would consist of the "worst of the worst". They arrived via Air Force C-17 transport and had to be

moved via ferry from the airfield, across Guantanamo Bay, through the Naval Station and residences and finally to the detention facility at X-RAY. When the first twenty detainees arrived, they were dressed in thick padded jump suits (appropriate for winter in Afghanistan but not tropical Cuba). They wore diapers because they hadn't been able to go to the bathroom during their 36 hour nonstop flight from Afghanistan. The C-17's refueled in mid air. The detainees were severely dehydrated and disoriented. This was a pattern we were to see during all the detainee transfers while I was in Guantanamo. They arrived with the pocket litter and any capture documents that accompanied them. These I instructed my J2 (Intelligence Officer) to collect and to ensure that an appropriate chain of custody was created. The pocket litter ranged from prosaic to inexplicable. They arrived with family photos but some had packets of crisp new \$100 dollar bills in numerical sequence which we later confirmed were genuine. From the capture documents, we could see very early on that in some cases the chain of custody had not been maintained and it would be very difficult to tie the evidence to the detainee.

As time went on we determined that the recommendation to ship a detainee to Guantanamo could be made at a very low level within the U.S. command structure in Afghanistan often based upon limited evidence, but the decision to return the detainee to their country of origin could be made only at the highest level of the Administration. This paradox became the basis for many detainees arriving who should never have been sent in the first place. Some of them are still in Guantanamo after eleven years.

The next shipment of detainees took place about 96 hours later and consisted of those suffering from battlefield injuries or illness. One detainee was "expectant," meaning in medical terms that he was expected to die. He arrived in Guantanamo suffering from battlefield wounds, TB, frostbite and pneumonia. We were able to save him. However at this point it became clear that Guantanamo was being used not just as a place to incarcerate potential terrorists but also for those who were a medical burden or who didn't have a satisfactory explanation for their presence in a combat zone. On the second shipment of detainees we received an Afghan man who had been determined by competent medical authorities in Afghanistan to be psychotic. Dubbed "Wild Bill" by the guards, he was a constant problem, disrupting the entire prison population. When I inquired of the Pentagon why such a person would be sent to us as his psychosis was so extensive that he had no value as an intelligence source and there was no evidence of any war crime and no basis for a trial, the silence was deafening.

Meantime, Guantanamo was becoming "ground zero" for Washington DC field trips. We were visited by several Congressional delegations, and the Secretary of Defense came twice with his entourage. Daily representatives of the various intelligence services—FBI, CIA, NSA, as well as intelligence agencies of other countries all came in briefly. Most spent less than 24 hours on the ground.

Media interest was intense. We were on a 36 hour cycle with one group of media after another coming in for briefings and to get their story. We felt that the decision to make Guantanamo the spotlight for the war on terror was perhaps intentional because it was manageable and it took attention away from what was happening in Afghanistan. Additionally it was much easier to get to Cuba than to Afghanistan and its' proximity ensured that we had visitors every day as well as lots of opinions (often conflicting) on how to manage detention.

JTF 160's mission was strictly detention and never interrogation. Initially the interrogation mission was carried out by a small contingent of intelligence officers who deployed from our higher headquarters out of the United States Southern Command. Later the Administration made the decision

to create a separate command with sole responsibility for interrogation. This was referred to as JTF 170 and it was commanded by a National Guard Major General named Mike Dunleavy.

JTF 170 began to form about seven weeks into the deployment and was fully stood up by the time I departed. The decision to create two separate commands—both responsible for separate aspects of detainee operations—was a curious and inexplicable one. A violation of the doctrine of unity of command, it created an almost unavoidable friction between the two commands. JTF 160's responsibility for the humane care and treatment of detainees juxtaposed against JTF-170's responsibility to get information out of the detainees as quickly as possible and set up a situation where the responsibilities were almost mutually exclusive. The relationship between JTF 160 and JTF 170 was professional but tense. It was fairly clear that our objectives were not in synch. During the time I was in command, I insisted that two of our guards be present during every interrogation to ensure proper treatment of detainees. This wasn't a popular demand but in the end, I believe that it was decided to "wait me out" until I redeployed and a more "cooperative" command could be put in place.

Certain decisions I made were not initially supported by either the Administration or JTF 170. My request to bring in the International Committee of the Red Cross (ICRC) was initially denied. I'd worked with the ICRC in the past and knew them to be professional. Moreover, if we were to make the claim we were treating detainees decently, we could not do so without independent verification. Ultimately we got the ICRC in through the help of my higher headquarters at SOUTHCOM. I also requested a Moslem Chaplain because I knew that our understanding of Islam and the cultural issues surrounding treatment of the Koran and dietary requirements was inadequate. After a great deal of effort we were finally allowed to bring in the chaplain. Almost immediately I was asked to use him for intelligence gathering—a request that I categorically denied.

On 22 January we received a ruling in the form of an OLC memo dismissing the opinion of the Department of State and Pentagon lawyers and asserting that Al Qaeda and Taliban were not entitled to Enemy Prisoner of War (EPW) status because both groups represented a failed state. No guidance as to what would replace the Geneva Conventions came with this ruling and I decided to continue to follow the Geneva Conventions for instructions on humane treatment.

We were also directed to begin preparing Guantanamo for Military Commissions and under the supervision of the Naval Station Commander, a former headquarters building was prepared for this eventuality.

On 27 January, Secretary of Defense Rumsfeld made his first visit to Guantanamo. At that point he clearly held the position that the detention facility was to be a temporary one. He was joined on the trip by Senators Feinstein, Hutchison, Stevens and Inouye, who all stated afterward that the detainees were being treated decently.

By the time I redeployed back to Camp Lejeune 89 days after my arrival we had 300 detainees located at X-Ray or in a specially constructed facility at the Naval Hospital or in a field hospital we had constructed for that express purpose. Throughout this period, I became more and more convinced that many of the detainees should never have been sent in the first place. They had little intelligence value and there was insufficient evidence linking them to war crimes. The problem of repatriation loomed. There were detainees from 33 different countries represented within the population of 300. The inadequacies of X-RAY as a detention facility were apparent and we'd completed construction of the first set of detention facilities at Radio Range. Perhaps most importantly, while we were striving for

humane treatment in the short term, the absence of a legal basis for their treatment, lack of agreement as to their status and absence of a system for determining the terms of their incarceration established the groundwork for the situation we find ourselves in today.

Because I and my command were force listed as part of the force designated for the invasion of Iraq, there was a great deal of interest in replacing me with an Army led JTF with the doctrinal mission of running detention facilities. I turned over command to Brigadier General Rick Bacchus U.S. Army Reserve on 28 March 2002.

ARGUMENTS FOR CLOSING GUANTANAMO

In the intervening decade since I left Guantanamo I've had much time to consider what I helped to create. Commissioned officers take an oath to "support and defend the Constitution of the United States against all enemies foreign and domestic." At the same time we are rightfully expected to carry out the lawful orders of our civilian masters. There are sometimes circumstances where our oath of office and the requirement to follow the orders of our political leaders fall into stark contrast.

Our nation created Guantanamo initially because we were legitimately angry and frightened by an unprovoked attack on our soil. We thought that the detainees would provide a treasure trove of information and intelligence and we as a nation were willing to ignore international agreements and support harsh interrogation measures to get it.

In retrospect the entire interrogation strategy was wrong. We squandered the good will of the world after we were attacked by our actions in Guantanamo, both in terms of detention and treatment. Contrary to the statements of several senior intelligence leaders, I doubt that the information we received was of particular value, and even if it was, there were better ways to get that information than the ones we employed that would not have cast discredit on us as a nation. Our decision to keep Guantanamo open has actually helped our enemies because it validated every negative perception of the United States. It still does. Instead of appearing strong and powerful, our decision to keep Guantanamo open makes us look vindictive and frightened, ready to ignore the rule of law if it is not to our advantage.

To argue that we cannot transfer detainees to a secure facility in the United States because it would be a threat to public security is ludicrous. The United States incarcerates a higher percentage of our citizenry than any other democratic nation in the world and most nondemocratic nations as well. While it isn't a statistic we should be proud of, it demonstrates conclusively that we know how to lock people up so that they cannot get away. Sadly, imprisonment has become a national core competency.

The real reason we cannot bring the detainees to the United States and that we can keep them in Guantanamo is that we have created a legal fiction that allows us to continue with extra-territorial incarceration of detainees, generally without trial or even without charges, against the basic principles of our Constitution and values. So the issue that must be resolved is whether this is appropriate behavior for the most powerful country in the world and a nation that has said it stands for the rule of law and for human rights. As long as Guantanamo exists, that claim is not defensible.

Many of the detainees currently in Guantanamo should be released and never taken to the United States. To argue that the release of less than 200 men back to their homes would threaten our security is also an overstatement. We cannot promise conclusively that any detainee who is released will

not become a recidivist and go back to plan an attack against Americans. Nor can we claim that any U.S. criminal released into society after serving their sentence will never commit another crime. The act of releasing a prisoner is about risk management. For 37 years I led Marines and every decision I made required me to balance the benefits of the action against the risk that I would lose a Marine. I led 5,000 Marines and Sailors during the initial invasion of Iraq and brought all but one home alive. In determining whether or not we should release detainees who have no charges brought against them, I would argue that our Constitution and the rule of law conclusively trump any additional risk that selective release of detainees may entail. It is time that the American people and our politicians accepted a level of risk in the defense of our Constitutional values just as our Service men and women have gone into harms way time after time to defend our Constitution. If we make a mockery of our values, it calls into question "What are we really fighting for?"

When I was the Joint Task Force Commander in Guantanamo, I spent many nights unexpectedly visiting the facility and talking to the guards. I did this because I wanted to be sure that my guidance for humane treatment was being carried out. Many of my young Marines and Soldiers were clearly troubled by my insistence on humane treatment pointing out that "the terrorists wouldn't treat us this well". My answer to each of these young service members was always the same. "Your point is accurate but irrelevant. If we treat them as they would treat us, we become them."

It is time to close Guantanamo. Our departure from Afghanistan is a perfect point in history to close the facility.

Thank you.

**Statement of Daniel C. Malone to the Senate Judiciary Subcommittee
on the Constitution, Civil Rights and Human Rights
on Behalf of Haji Wali Mohammed**

Haji Wali Mohammed (ISN 560) is an Afghan who has lived in Pakistan since his family fled the Soviet invasion in the late 1970s. He rose from a life in a refugee camp to become a well known currency exchanger; his fortunes have since fallen. Pakistani intelligence personnel arrested him in his home on the night of January 24, 2002, and transferred him to American custody several days later. He has been imprisoned on the suspicion that he was involved in some form of financial facilitation. The government has never charged him with a crime, but says he's too dangerous to release. He says he's done nothing wrong.

I was one of a team of lawyers who filed a habeas petition on Wali Mohammed's behalf in 2005. In November 2008, the government filed its first justification of Wali Mohammed's detention. In December 2009, it filed a second, substantially different justification. In March 2010, during a motion for judgment based on the second justification, the government amended its justification again. By the time the government stood ready for trial, even this third version of its case had changed.

Wali Mohammed testified on his own behalf. He had been telling the same story for years, but was anxious to tell it again. He always seemed to believe that if he just told the truth, the truth would set him free. In the spring of 2010, he believed that more than ever, as he would finally have a chance to tell the truth to a real judge. He testified for a day. A former worldwide director of human intelligence collection for the Defense Intelligence Agency testified for him as well, as an expert on intelligence issues. The two sides presented closing arguments.

I felt the trial had gone well for us; so did my colleagues. So, it seems, did the government's lawyers. When several months had passed without a decision, the government made a secret motion to reopen the record, which the court granted before we had any chance to oppose it. Given this opportunity, the government started building a new case.

I was shocked. Wali Mohammed was *devastated*. He had stored up so much hope—more, I think, than he'd realized. He'd finally had a chance to testify in court, to have a decision that mattered after over eight years in prison. And we had done nothing to prepare him for this turn of events; we hadn't imagined the possibility.

We had a conference call with him soon after. He didn't ask after our families, as he usually would. He didn't joke or laugh, as he sometimes did. He seemed angry. The conversation was going nowhere. He started talking about his family, saying how worried he was about them, how they were suffering and he couldn't help them. And then, he was

begging—begging us, begging anyone—to be able to see his children. Anywhere—he no longer cared about going home. Anything—he didn’t care what he had to do. He was sobbing, wailing, pleading to see them. Our translator couldn’t keep going. He, too, broke down. So did I. I’m sure others did too.

Nearly three years later, we are approaching a second trial. The government again has a new case—its fourth. Some of the evidence it has used to try to justify Wali Mohammed’s indefinite detention is secret—known only to its lawyers and the judge.

Wali Mohammed will testify again at his second trial, but without the same belief in our justice system. We will be ready—but we can only oppose what we know. We don’t speak with him anymore. He has asked that we just write him. He doesn’t want to be subject to genital searches, as are now required to have a telephone call.

In the years since the last trial, Wali Mohammed’s eldest son, who quit school to try to support his family, died in a traffic accident. Wali Mohammed nearly went mad over this. One of Wali Mohammed’s sisters is gravely ill, as is one of his brothers. He may never see them. The life he had hoped to provide for his children is slipping away. They aren’t being educated the way he would have wanted; they are sinking into a hardscrabble existence.

Wali Mohammed has been held for over 11 years now—without charge, and without a court’s decision, in a contested proceeding, as to whether the government’s shifting claims provide a legal basis for taking him from his home and his family, and putting him in prison.

STATEMENT FOR SENATOR DURBIN
 Brig. Gen. (Ret.) David R. Irvine, USA
 July 24, 2013

I'm David Irvine; I live in Salt Lake City, Utah. I'm an attorney in private practice. I enlisted as a private in the 96th Infantry Division, U.S. Army Reserve, in 1962. I was trained as an intelligence analyst. I received a direct commission as a strategic intelligence officer in 1967. I retired as a brigadier general in 2002. My last assignment was deputy commander for the 96th Regional Support Command, and I held a faculty position for 18 years with the Sixth Army Intelligence School, where I taught prisoner of war interrogation and military law for more than a thousand soldiers, airmen, and marines. Since 2005 I have been closely involved with a group of more than 50 retired flag officers who have worked assiduously and publicly to get the United States out of the torture business, to close the prison at Guantanamo, and to end the reliance on military commissions. For the past two years I was a member of the Detainee Treatment Task Force sponsored by the Constitution Project. I've also served four terms as a Republican member of the Utah Legislature.

For me, this all began with the photographs from Abu Ghraib. Those photographs and the story behind them left me in complete shock, as did the revelation that Abu Ghraib was the lineal descendant of Guantanamo Bay, Cuba. I could not believe that the Army I served for 40 years was capable of such barbaric treatment of prisoners in our custody. The notion that it could be excused by calling them detainees was all the more offensive. I had spent the better part of a military career teaching soldiers how to be effective interrogators within the constraints of the Geneva Conventions. I had drilled my military students with the example of Warrant Officer Hugh Thompson, who, as a helicopter pilot in Vietnam had discovered the My Lai massacre and landed his chopper between a group of unarmed civilians, and at gunpoint turned back an Army platoon bent on murdering them. It was unthinkable to me that torture and abuse could have been ordered at the highest levels of our government. It was unthinkable to me that officers and noncommissioned officers at Guantanamo Bay, Abu Ghraib, and dozens of other locations in Afghanistan and Iraq could watch the Geneva Convention abuses by their troops and do nothing to interfere. I didn't know it then, but I had a lot to learn.

I've never been to Guantanamo, but I've had a Guantanamo experience that not many have had, and I'd like to share it with you. In April 2012, I was in London to interview three former Guantanamo prisoners and one of their lawyers. Moazzam Begg, Bisher al-Rawi, and Omar Deghayes. The lawyer was Clive Stafford Smith. It was an experience I will never forget. I have attached the profile information on the three prisoners prepared for the London interviews by the Constitution Project's staff for the Task Force on Detainee Treatment. They are provided as Exhibits 1, 2, and 3.

The previous administration classified these Guantanamo prisoners as "the worst of the worst," just as the government has said about every prisoner, past and present. The men with whom I spoke are very well-educated, bi-lingual, and they would have charmed a dinner party at your home or mine. Begg had legal training. Deghayes is a law graduate. I should be clear: until that interview, I had refrained, in my own mind, from using one word in conjunction with Guantanamo and all it represents. After talking at length with these men about their experiences

there, the word that keeps creeping into my consciousness, with respect to what “we” have done there, is: “depraved.” That’s a huge word. But it fits. All the more so because many of those who were at Guantanamo were guilty of nothing more than being in the wrong place at the wrong time, and they were sold to us for a bounty.

Mr. Begg made a comment you would find ironic. He was held in solitary confinement for two years, but he said, “I got a classical education at Guantanamo. They wouldn’t let me read news or anything about current events, so I read Dickens, Tolstoy, and Dostoevsky.” When I noted that some would describe “War and Peace” as self-inflicted torture, he smiled and laughed. Mr. Begg was interrogated more than 300 times.

Mr. Begg spoke at length about how damaging Guantanamo and torture have been to our interests around the world. He said he has traveled extensively since his release, but has been denied entrance to only two countries: Canada and Qatar – both denials per the request of the United States. He has never been charged, he has never been tried on charges. He is on a US no-fly list as a “sponsor of terrorism.” The evidence: “My book – the fact that I published it.”¹ “I am guilty of having been a prisoner at Guantanamo; that is my crime.” Before he was finally released, he was visited in solitary by two CIA officers who had interrogated him when he was first arrested. They brought in a “confession” for him to sign. He was told that he could “go before a judge” if he signed the confession, and also that he could be released to his family if he would agree to become an informant. He said, “The confession read like it had been written by a 12 year-old. There were all of these references to my having had dealings with Osama bin-Laden, and when I said that none of that was true, I was told that it had to be in the statement, and if I resisted I would be sent to Egypt. The only reason I signed was because I wanted to go in front of a judge and tell about everything that had happened to me in American custody. If I had known they wouldn’t allow that, I would never have signed.”

That coerced confession is the basis for his status today as a sponsor of terrorism. There were false promises made, he was denied legal counsel even though the statement was intended for use in a judicial proceeding. I asked him what had been the worst treatment he had experienced. He said, “I could take the beatings. The worst torture was when they told me they had arrested my wife, and I heard a woman screaming in another cell, and I thought they were torturing her. I have never heard my wife scream, so I had no reason to think it wasn’t her. It was torture seeing and hearing other prisoners being tortured and beaten.”

Bisher al-Rawi was one of the oldest prisoners when he was arrested, at age 40. Of the three, he had the most wry sense of humor, and he is smart enough to fully understand the Kafkaesque nature of much of what went on. When he was finally told that he would be taken in front of a Combatant Status Review Hearing the next day, he asked for paper and a pencil in order to write out what he felt he needed to say at the hearing. He was told he could either have paper or a pencil, but not both. He went before the CSRH, and without access to evidence or counsel – the hallmarks of due process – he was determined to be a continuing threat. The next day, he

¹ “Enemy Combatant: The Terrifying True Story of a Briton in Guantanamo,” by Moazzam Begg with Victoria Brittain. First published in Great Britain by The Free Press, 2006; republished by Pocket Books, 2007 (an imprint of Simon & Shuster UK, Ltd: a CBS Company).

was handed a weeks-old letter from his lawyer (obviously it had been held back) advising him to not appear or cooperate.

Mr. al-Rawi described prison conditions: "The food was terrible, and it was seldom enough. We were always hungry. I was surprised when I got there (Guantanamo) that everyone looked so skinny. We could never get medical treatment. Because I could speak English, other prisoners would ask me to try to get medical help for their problems. I made the requests, but I had to make them over and over. Once, I was transferred to another area, and a few months later, when I was transferred back, the same guy was still having the same problems." He said that everyone was sick much of the time and had dental problems, and that they were told by guards and interrogators that part of the plan was to send them home with all kinds of diseases and impairments, so they would never be healthy again, and their families would forever have to care for them like children. Mr. al-Rawi said that he was instructed (step-by-step) by a doctor about how to hang himself in his cell, and that anti-depressants (Prozac) were distributed for the fun of guards watching hallucinatory reactions.

I asked Mr. al-Rawi what had been the worst treatment for him, and he said, "Watching and listening to other people being beaten." He then described what had been the most demeaning experience. That was being taken for showers in groups of 10 or 12 at a time. He said, "They would make us strip naked in our cells, and then they would chain us in a line, front-to-back, with our hands tightly-cuffed under another man's private parts. That was terribly degrading for Muslims or anyone else, and it really, really hurt as we would struggle along." All three objected to the forced nudity, and while naked, being "photographed, touched, assaulted, spat upon, ridiculed, and threatened with dogs.

Omar Deghayes walked in with an obviously broken nose and one very gimpy eye. He had graduated from law school and was waiting to take exams when he was arrested. He was the biggest of the three, and was the most resistant of the three to the prison regime. I asked him what had been the worst things done to him, and his response was identical to the others. His physical injuries were inflicted by guards in "reaction force" episodes, where 6 guards in SWAT gear would enter a cell to subdue an uncooperative prisoner. They would force him to the floor, park three guys on top of him, cuff his wrists and legs, and then beat the daylights out of the guy on the ground. Thus the broken nose. His eyes were targeted by an officer and a guard in one of these. The guard pushed his two forefingers into Mr. Deghayes's eyes so forcefully that Deghayes could feel the fingers under his eyelids. The officer yelled "Push harder" and the guard yelled, "I'm pushing as hard as I can." When they finally stopped, Deghayes felt liquid running out of both eyes, and he couldn't see. He wasn't given medical treatment for several days. He finally regained the sight in one eye, and then the doctor he saw recommended that he remove the blinded eye, which Mr. Deghayes refused. He said that these "beatings on the floor" would always be followed by sexual abuse, although he wouldn't be specific about exactly what happened, even when we asked once when the woman accompanying us had left the room. Mr. Deghayes told of a practice of holding prisoners' heads in the toilets until they thought they might drown – and they never knew if they'd survive.

Each man said that interrogators would say, "Just give us something, and we can treat you better." I asked what kinds of information the interrogators were looking for, and Mr. al-

Rawi said, "They wanted us to justify why we were being held – they wanted a story that would keep us there for life. It didn't have to be true, it just had to come from us."

When lawyers began representing the Guantanamo prisoners, the prison staff did everything they could to cause distrust. In addition to telling the prisoners that their lawyers were Jews or homosexuals, the guards and interrogators would tell the prisoners that the prisoners' lawyers were working for the interrogators. They would interrogate the prisoners about their discussions with their attorneys. Clive Stafford Smith, who has represented many of the Guantanamo prisoners, said that he's spent the equivalent of a year at Guantanamo, and that of all the death rows in the United States, "and I've been to all of them, Guantanamo is the worst."

One of the questions I asked Mr. Begg, as he was describing Guantanamo as "the American legacy to the world that never dies," was "What would have happened if in 2009, President Obama had closed the prison?" Response: "It would make all the difference in the world." They all also said, "But the longer it goes on, the less closure will mean to a generation of people all over the world, especially Muslims, that will have written you off."

Mr. Deghayes added, "I always thought Guantanamo was a missed opportunity for the American government to explain the better side of the United States. To many youngsters who were imprisoned, seventeen years old, twenty years old, from all over the Middle East, to show them there were other good things in America rather than what you hear in the news."

That brings us to today and the importance of this Committee's hearing. Why does closing Guantanamo remain a national security imperative?

Guantanamo is an irretrievably-damaged brand. The name instantly conjures up images of orange-clad, bound and hooded prisoners, kneeling on the ground in front of their American jailers. It reminds a world-wide audience, over and over, that it and Abu Ghraib are the places where America sold its soul and shredded its founding principles and values. Every day it remains open, it reminds the world that America, too, has a gulag where people can be sent, tortured, and held forever, without charges or a trial. But Clive Stafford Smith has wryly made a most uncomfortable point: "No Soviet gulag ever had 52% of its prisoners cleared for release."

Col. Morris Davis, the former chief prosecutor at Guantanamo, who resigned rather than use evidence obtained from torture, offers this perspective: "There's something fundamentally wrong with a system where not being charged with a war crime keeps you locked away indefinitely, and a war crime conviction is your ticket home." Former Chairman of the Joint Chiefs of Staff and Secretary of State Colin Powell has said, "I would close Guantanamo. Not tomorrow, but this afternoon." Farmers in Afghanistan, peasants in China, and teenagers throughout the Middle East may not understand the intricacies of American constitutional law, but they all understand hypocrisy. What makes us think we can presume to lecture despotic governments around the world about their need to respect human rights and dignity when they can point to Guantanamo and say with absolute legitimacy, "Who are you to be criticizing anything?" It reinforces the radical message, and it's a recruiting magnet for those who want to

do us harm. It is a cancer on America's claim to moral leadership that becomes more dangerous every day it remains open.

Our detention and interrogation practices have jeopardized our working relationships with close allies. In an interview with the Detainee Treatment Task Force, former General Counsel of the Navy, Alberto Mora said, "The country doesn't really understand the cost. One JAG officer came in and said that the British military had captured a terrorist – not a terrorist suspect, a terrorist – in Basra and released him. They gave him a 48-hour head start and only then notified the American authorities. They did not have detention facilities [at that time], and they did not trust either the United States or the Iraqi forces not to abuse this individual. So rather than engage in potentially aiding and abetting criminal activity, the British forces thought that the least worst option was to release a terrorist back into the field."

Mora continued, "The British deputy commander of NATO operations in Afghanistan would get up and leave any meeting in which detention operations were discussed, because he would not take a role in all of this. The Australian Navy refused to train with the U.S. Navy in detention operations [because of the abuse]. I was at the Pacific Military Law Conference [in Singapore], the premier meeting of international military lawyers in the world. At one point I get cornered by the uniformed TJAGS [the highest ranking JAG officer in a military branch of service] of the UK, Canada, Australia, and New Zealand. And they're around me, fingers in my chest, and they say, 'We've trained with the United States military all our lives, and we deeply respect everything you do . . . but you need to know that our issues with detainee treatment and interrogation, we can't go along with that. Our countries won't do it. It's not a question of failure of communication; we know what you're doing. It's a question of criminal activity in our countries, and we can't be a party to this.'"

Even defenders of the CIA's "enhanced interrogation techniques have recognized that relationships with allies can weigh in the decision of whether to engage in such practices. At a panel discussion on January 29, 2013, at the American Enterprise Institute, former CIA Director Michael Hayden acknowledged: "Look, even though we say it is effective, the consequences of doing it *vis-à-vis* our allies could outweigh any benefit we might gain."

The Guantanamo brand-damage extends as well to the system of military commissions the Obama administration is using to try Guantanamo prisoners today. It's not just that military commissions lack credibility; it's also that they are sited at a place renowned for having been chosen deliberately to be beyond the reach of the rule of law. As I'll explain shortly, the history of military commissions is highly suspect in its own right, so it's strange that we have opted to double down on a system of faux justice by siting the courtroom in a place that stands for secret renditions, torture, brutality, and indefinite detention without charges or a trial. We are only kidding ourselves if we believe the United States can make the Guantanamo sale.

The fifty or so retired generals and admirals for whom I'm speaking, along with General Eaton and General Xenakis, are adamantly opposed to the use of military commissions to try the Guantanamo prisoners. One of the most concise analyses of the flaws of military commissions and their shabby history as damaged goods in the annals of military justice was authored by our colleague, Brig. Gen. (Ret.) James P. Cullen, USA, for a presentation he gave last December at

the University of Minnesota Law School. General Cullen practices law in Manhattan, and he served as an Army Judge Advocate General. He was the Chief Judge for the United States Army Court of Criminal Appeals. I've attached his Minnesota presentation as Exhibit 4, and I'll quote extensively from it.

We oppose the use of military commissions for the following reasons:

1. Requiring terrorists to be tried in military commissions grants them a layer of legitimacy they do not merit. Military commissions add a veneer of respectability to their claim to be warriors instead of common criminals.
2. Military commissions do not have the experience to try high level terrorism cases with multiple counts of murder. Federal courts have that experience, especially in the Northern District of Virginia and the Southern and Eastern Districts in New York. The FBI agents, the prosecution teams, and the judges have all accumulated considerable experience since 1993 in trying international terrorism cases, and we should use and showcase that experience.
3. Military commissions have not produced the results obtained by the federal courts. There have been only seven convictions in military commissions out of roughly 779 prisoners held at Guantanamo at one time or another, and who were described by Secretary Rumsfeld as the "worst of the worst." Sixty different federal courts have convicted nearly 500 terrorists since 9/11, and 44 of those trials were in the Southern District of New York.
4. Convictions in the military commission system will be subject to years of appeals challenging the fairness of the system and jurisdictional issues, such as those directed to conspiracy and material support charges, despite reforms made under the 2009 Act.
5. Foreign governments will be less willing to cooperate if cases are pursued in military commissions rather than federal courts. Our federal courts are trusted overseas. We need the cooperation of foreign governments in many of the serious cases since witnesses, documents, and sensitive intelligence of possible value in prosecutions are within the control of foreign governments. We will not receive the same level of cooperation if requests come from military prosecutors in commission trials compared to requests coming from U.S. Attorneys in federal court prosecutions.
6. Military commissions are a badly damaged brand, in part because of their misuse by other countries and in part because of the outrageous rules imposed on them in 2002 as they were then established by presidential executive order. Some of those rules prohibited civilian counsel from seeing evidence against their clients, and evidence obtained through torture could be admissible in some circumstances.
7. These past practices, and the images of Guantanamo and Abu Ghraib, are what the world, and Americans who care about the rule of law, remember. American values and the American justice system are better than any alternative terrorists can offer. We

should not be afraid to showcase our judicial system, and its emphasis on fairness, for all the world to see. If there is to be a cleansing antidote to the stain of torture and abuse, demonstrating a commitment to real justice is a necessary ingredient.

8. We should use our military forces to fight our wars; and we should use our Justice Department and federal courts to try charges against alleged terrorists – as we do all other kinds of criminals.

Military commissions have long been perceived (and used) as instruments of drum head justice with preordained outcomes. That was surely the view of the Continental Congress in 1776. Our Declaration of Independence identified “a long train of abuses and usurpations,” and charged King George III with “affect[ing] to render the Military independent of and superior to the Civil Power.”

When the Congress gathered in Philadelphia in 1787 to find a replacement for the Articles of Confederation, they brought with them fresh experience about the law of war [or the law of nations as it was then called] and tribunals. They concluded that tribunals should be authorized by Congress, “to make rules for the Government and Regulation of the land and naval forces. They also provided that the Writ of Habeas Corpus, the “Great Writ” of the English common law, should be incorporated into the Constitution and be available to anyone who challenged the legality of their detention. The Constitution provides that the Great Writ could only be suspended in times of insurrection or invasion. That was the great appeal of Guantanamo, as a black hole of the detention and interrogation of prisoners who could forever be kept beyond the reach of the Great Writ and the federal courts.

Military commissions were widely used in the Civil War, with some extreme results. General Ambrose Burnside, responsible for the Union disaster at Fredericksburg was reassigned to the military district of Ohio. Once in his new command, he issued an order imposing up to the death sentence on those who not only gave physical aid to the Confederacy but even expressed “sympathies” for the enemy. An Ohio Democratic Congressman, Clement L. Vallandigham was the first tried before a military commission for violating the order after addressing a public gathering in which he questioned the need for the war. President Lincoln put aside the sentence of the military tribunal which found the Congressman guilty, and instead directed that he be brought to Confederate lines and turned over to them. The Congressman’s attorney challenged the jurisdiction of military commissions to try a civilian, since the courts were open and available. The Supreme Court punted, and held that it had no authority to review the proceedings of a military tribunal.

Military commissions were used in Hawaii in World War II to try civilians, and that led to confrontations between the military commander of Hawaii and federal judges who, after the Battle of Midway found no justification to try civilians before military commissions when the courts were open and available. The Supreme Court ultimately found that Congress had not authorized the suspension or closure of civilian courts, to be supplanted with military tribunals.

The most troublesome military commission case was the 1942 *Quirin* case. Eight German soldiers who had lived in the United States before the war, went back to Germany

before the war commenced, and were drafted into the German Army. They spoke excellent English and were trained as saboteurs. Two were American citizens. One team of four saboteurs landed from a submarine on Long Island, and the other team landed in Florida. Two of the Long Island men, including one American citizen, had a change of heart and decided to turn themselves in. The FBI did not believe them at first, but finally took them into custody. The others were picked up as a direct result of the two who had surrendered. U.S. authorities originally planned to try the men in federal court. However, one of the two who turned himself in insisted that he would tell the full story when he went to trial. This created a major problem for the authorities, since they had already taken full credit for the capture of the saboteurs without disclosing that the capture had resulted from the voluntary surrender. The authorities did not want people to know how easy it was for enemy submarines to land personnel on American shores.

Other considerations influenced the Administration's decision to change the venue for trial from federal court to a military commission. Sabotage carried a maximum penalty of 30 years in prison. President Roosevelt wanted the death penalty, and the commission was authorized to impose it. Roosevelt told the Attorney General that he did not want the military to split any legal hairs. The Judge Advocate General was able to tell the commission panel members that they could apply such rules as they saw fit since the rules applicable to courts-martial would not apply under the executive order that convened the commission.

The trial was held in secret. All men were found guilty and sentenced to death. Roosevelt later reduced the sentence of the two who surrendered to a long prison term, and the others were electrocuted. Before the tribunal could reach a verdict, the Germans sought a writ a habeas corpus from the civil courts. That avenue was blocked when the Supreme Court upheld the jurisdiction of the tribunal in very unusual circumstances that remain controversial to this day. Even Justice Scalia has noted that *Quirin* case did not represent the court's finest hour.

What is very clear since 2009 is that the Guantanamo prosecutors have had to spend as much time trying to defend their system as trying to prosecute the defendants. For all the tweaks and massaging, the commission system is still perceived to be fundamentally flawed, because it cannot persuasively dodge the issues of torture and perceived unfairness. The U.S. military handpicks the judge and the potential panel members, all of whom are military personnel. The system looks rigged to produce a command-influenced result. The 2009 reforms prohibited the use of evidence obtained through cruel, inhumane, or degrading treatment. However, involuntary statements made by third parties are admissible if they are not derived from the same measures. It's not clear how that works. Statements from the accused may only be introduced if they were "voluntary." To determine "voluntariness," the judge is to look at the totality of the circumstances, and the circumstances may include, "as appropriate, lapse in time, change in place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused." That last element seeks to add statutory legitimacy to the practice of sending uncontaminated FBI teams to question high value prisoners, after some of them were tortured by the CIA.

Boise attorney David Nevin is a lawyer for Khalid Sheikh Mohammed. He puts the issue this way: "My question is when is it OK to use statements they uttered after being waterboarded?"

KSM was waterboarded 183 times in March 2003. Is it OK a day later, a week, a month, a year? When?" Article III federal courts are adept at sorting through evidence that can be admitted and that which cannot. In the case of Ahmed Ghailani, the court excluded evidence of torture, and the government still secured a conviction and life sentence for the crimes he committed. If KSM had been tried in a federal court, it's hard to imagine the case would still be dragging on. David Raskin, the former Chief of the U.S. Attorney's terrorist and national security unit for the Southern District of New York, was preparing to try KSM when President Obama abruptly renewed the military commissions in 2009. Raskin is quoted in a March 1, 2013 *ABA Journal* story: "Gen. Martins ² and his team are essentially going to have to try two cases in every one case they do, because they will be trying to convict a defendant and trying to legitimize their system." Adds Eugene Fidell, a visiting lecturer at Yale Law School, a former Coast Guard JAG, and an expert in military law, "You have to wonder why so much effort has been spent justifying [the commission's] existence when we already have a fabulous judicial system."

Again, all of the maneuvering to make the commissions look fair, like the elaborate "voluntariness" regime, cannot overcome the perception that they're not. In April 2013, *Al Jazeera* carried a piece about the 500,000 internal defense e-mails that were seized by the government and the loss of defense files from computer servers. The story included references to the sudden interruption earlier this year of the public feed from the military courtroom at Guantanamo, the switch evidently controlled by the CIA unbeknownst to the judge. The story described eavesdropping equipment in rooms where attorneys meet with their clients. *Al Jazeera's* readers and listeners may not understand the intricacies of American constitutional law, but they have keen antennae for hypocrisy, and they know what this is all about: the United States is desperately fearful that the truth of American torture will come out.

If the prisoners at Guantanamo were American soldiers who had been tortured and abused, and they were being put through a military commission process like the one we're trying so hard to sell, the country would be outraged – and rightly so. Professor Gary Sollis, former Marine Corps JAG officer and a Georgetown University authority on the law of warfare, says of the current system, "They are so hobbled by a history that they, in my opinion, cannot work in a way which will be understood or appreciated outside of their courtroom."

The commission system can be dressed up in spiffy new duds; the Administration can attempt to make the sale a dozen different ways, and the appellate courts can split hairs forever over the military commission rules in an effort to get just the right shade of lipstick on the pig. But all those tortured efforts cannot make Guantanamo a beacon of justice. The brand is just too notorious. Just the word, *Guantanamo*, saps America's capability for moral suasion in a world that badly needs American leadership.

Ultimately, Guantanamo is not about those who attacked us, but about **who we are**. It is a false and unworthy choice to suggest that, in the pursuit of safety, we must abandon our Constitution and our values. We are more secure when we follow the law, not when we abandon it. Winston Leonard Spencer Churchill observed that Americans can be counted on to do the right thing – after they've exhausted all the alternatives. Congress and the administration need to close the prison. Now.

² Brig. Gen. Mark Martins, USA, the current chief prosecutor for the Guantanamo military commissions.

EXHIBIT 1

Profile of Moazzam Begg

Moazzam Begg is a British citizen, born and raised in Birmingham, England.¹ Begg was raised in an educated, middle class family in Birmingham, and was sent to a Jewish elementary school.² Begg later traveled to places like Pakistan, Afghanistan and Bosnia to learn more about his heritage and work with Muslim charities.³ Those travels, from 1993-1998, included visits to Bosnian battle zones as a member of a charity aiding Bosnian Muslims, and two Afghan training camps. Begg maintains that the training camps were run by the Northern Alliance and Iraqi Kurds fighting Saddam Hussein, respectively, rather than Al Qaeda.⁴ Begg has said that he never trained himself.⁵ While living in Peshawar, Pakistan in 1998, Begg was suspected of having met Khalil Deek, an associate of Zayn Al-Abedin Muhammed Husayn (known as Abu Zubaydah), and assisting him on a terror manual.⁶ Begg acknowledged meeting Deek as a member of the community, and collaborating on a business idea to sell traditional clothing, but says that he never met Abu Zubaydah.⁷ The Department of Defense claims that Begg admitted to knowing Abu Zubaydah during interrogation and in a written confession; Begg maintains that he never made such statements, but signed certain documents under coercion, as detailed below.⁸ Begg returned to the UK with his family in 1998 and opened an Islamic bookstore in Birmingham which he described as a meeting place for young Muslims.⁹ The store was raided twice in 1999 and 2000 by British police, but Begg was never charged with a crime.¹⁰ Begg stated that he had believed the security establishment's interest in his store was "a silly mistake or a fishing trip" until the second raid. He also stated that he had never heard of "Al Qaeda" before September 11, and his view of Bin Laden was that OBL's campaign against the United States was counterproductive for Muslims.¹¹

Begg moved his family to Kabul, Afghanistan in the summer of 2001, where he planned to start a girl's school and oversee a project digging wells.¹² Begg's petition for *habeas corpus* states that in November 2001, after the September 11th attacks and the initiation of the U.S. war in Afghanistan, Begg evacuated his family to Islamabad, Pakistan.¹³ The petition further states that on January 31, 2002, Begg was seized in his home by Pakistani officials.¹⁴ Begg stated that he was shocked when he opened the door that night to see the officials standing there with a gun pointed at him and "electric stun guns crackling in the background."¹⁵ He states that he was held by Pakistani officials for several weeks before

¹ *Enemy Combatant: Moazzam Begg on His Imprisonment at Guantanamo, Bagram, and Kandahar*, Democracy Now, Aug. 1, 2006, http://www.democracynow.org/2006/8/1/pt_2_enemy_combatant_moazzam_begg.

² Interview with Moazzam Begg, PBS: NOW, July 28, 2006, <http://www.pbs.org/now/transcript/230.html/> (hereinafter "NOW Interview").

³ *Id.*

⁴ Channel 4 News: Moazzam Begg Interview, Feb. 24, 2005, available at <http://www.channel4.com/news/articles/uk/moazzam-begg+interview+two+people+were+beaten+to+death/256788.html>.

⁵ *Id.*

⁶ Golden, Tim, "Jihadist or Victim: Ex-Detainee Makes a Case," The New York Times, June 15, 2006, available at http://www.nytimes.com/2006/06/15/world/15begg.html?_r=1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² NOW Interview, *supra* n. 2.

¹³ Petition for Writ of Habeas Corpus, *Begg v. Bush*, No. 1:04CV01137 (D.D.C. filed July 2, 2004), at 4-5, available at <http://projects.nytimes.com/guantanamo/detainees/558-moazzam-begg/documents/4> (hereinafter "*Begg v. Bush*").

¹⁴ *Id.*

¹⁵ NOW Interview.

being handed over to U.S. custody.¹⁶ Once in U.S. custody, Begg was reportedly transferred to Kandahar, Afghanistan.¹⁷

Upon arrival at Kandahar, Begg said that he was stripped naked by guards wielding knives.¹⁸ He added that the guards then pushed their knees into his back and head.¹⁹ He also identified other things that were done to him and other detainees upon arrival, including cavity searches, “playing with private areas, taking photographs, shaving off the hair and the beard and stamping on [his] feet—spitting, swearing, all sorts of things.”²⁰

From Kandahar, Begg stated that he was moved to a U.S. military base in Bagram, Afghanistan.

²¹ He added that his time in Bagram “was the worst part of [his] incarceration.”²² Begg said that detainees were not allowed to talk to each other, or to walk, or to do anything else without express permission.²³ If they violated these rules, Begg said that their hands would be tied to the top of their cell, leaving them on tiptoe, and they would be hooded or blindfolded for hours or days on end.²⁴ While at Bagram, Begg said that he was also threatened with being rendered to Egypt to be tortured.²⁵ He was also apparently hog-tied, “hooded, punched, kicked, spat at and so forth, sworn at, [and] held like this . . . for hours on end, deprived of sleep for several days only to hear the sounds of a woman,” whom he presumed to be his wife, “screaming next door.”²⁶ After reportedly spending eleven months at Bagram, Begg was transferred to Guantanamo in January 2002.²⁷

In describing his time in Guantanamo, Begg said that the interrogation tactics used there were more psychological than physical.²⁸ He stated that he spent nearly twenty months in isolation at Guantanamo’s Camp Echo.²⁹ The habeas petition submitted on Begg’s behalf further disclosed that Mr. Begg and other Guantanamo detainees were “refused meaningful access to their families” and were not permitted to “fully exercise their religious beliefs.”³⁰ As noted in the petition, detainees were moreover “initially forced to use a bucket for a toilet,” and had no access to basic sanitary facilities.³¹

According to news reports, Begg, along with three other British citizens (Richard Belmar, Feroz Abbasi, and Martin Mubanga), were released from Guantanamo on January 27, 2005, after the governments of the U.S. and U.K. negotiated the release and “security package[s]” for the detainees.³² The four men were still regarded as “enemy combatants,” but no charges had been filed against them.

Following his release from Guantanamo, Begg wrote a book about his experiences at entitled “Enemy Combatant,” in which he described his treatment while in U.S. custody, and his attempts to forge positive relationships with his former interrogators.³³ Begg also became Director of the nongovernmental organization Cageprisoners, which campaigns on behalf of Muslim prisoners, with a primary focus on those held at Guantanamo Bay and other sites related to the conflict with Al Qaeda. Cageprisoners works

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Begg v. Bush*, at 5.

²² NOW Interview.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Guantanamo four still a threat, says US*, *The Guardian*, Jan. 27, 2005, <http://www.guardian.co.uk/uk/2005/jan/27/politics.september11>.

³³ Begg, Moazzam, *ENEMY COMBATANT*, *The New Press*, Aug. 1, 2006.

closely with a number of former detainees, and has condemned detention without charge for a number of suspected terrorists, including Anwar Al-Awlaki (whose targeted killing Cageprisoners also opposed).³⁴ Cageprisoners (and Begg) maintain that they condemn radical positions and the killing of civilians, but advocate for the right of those living under foreign occupation to fight in self-determination according to international law.³⁵ In highlighting the issues of abuse and detention without charge, Cageprisoners works regularly with organizations such as Reprieve and Amnesty International, although such associations have occasionally proven controversial.³⁶

³⁴ Press Release: Cageprisoners and Anwar Al-Awlaki, A Factual Background, Nov. 5, 2011, *available at* <http://www.cageprisoners.com/our-work/press-releases/item/786-press-release-cageprisoners-and-anwar-al-awlaki-%E2%80%93-a-factual-background>.

³⁵ *Id.*

³⁶ *See, e.g.*, “Amnesty International on its Work with Moazzam Begg and Cageprisoners,” Feb. 11, 2010, *available at* <http://www.amnesty.org/en/news-and-updates/news/amnesty-international-on-its-work-with-moazzam-begg-cageprisoners-20100211>.

EXHIBIT 2

Profile of Bisher al-Rawi

Bisher al-Rawi is an Iraqi national with residency status in the United Kingdom, where he had been granted exceptional leave to remain as a teenager in 1984.¹ His family came to the UK after fleeing the regime of Saddam Hussein, which had tortured his father.² The British Security Service (MI5) assessed al-Rawi and his associate, a Jordanian Palestinian named Jamil el-Banna, to be extremists due to their alleged contact with others whom MI5 considered Islamic extremists, including the radical cleric Abu Qatada.³ Al-Rawi claims that he acted as an intermediary between MI5 and Abu Qatada following 9/11.⁴ Al-Rawi says he met with agents who called themselves 'Alex,' 'Matt,' and 'Martin,' and that after he expressed concern about self-incrimination, an MI5 lawyer named 'Simon' promised him help if he were ever arrested.⁵

Several agents of MI5 met with el-Banna on Oct. 31, 2002 in an attempt to gain his cooperation, promising a new life for him and his family in exchange for information about his activities and contacts.⁶ El-Banna declined their offer.⁷

On Nov. 1, 2002, al-Rawi, el-Banna, and a British citizen named Abdullah el-Janoudi went to Gatwick Airport to travel to The Gambia.⁸ The stated purpose of this visit was to join al-Rawi's brother Wahab, a British citizen, for a business venture involving peanut oil.⁹ They were arrested at Gatwick after airport security found a suspicious-looking homemade electronic device in al-Rawi's luggage, which authorities believed might be a timing device or part of an IED.¹⁰ Al-Rawi and the others claimed it was a homemade battery charger, which a British anti-terrorist squad confirmed after four days of detention and interrogation.¹¹ They were released on the afternoon of Nov. 4, 2002.¹²

MI5 sent a telegram to U.S. authorities informing them of the arrest on Nov. 1.¹³ After al-Rawi and the others were released on Nov. 4, MI5 sent the Americans a second telegram suggesting that the Americans inform Gambia that three men with links to Abu Qatada were traveling to that country and stating: "We would be grateful for any feedback on the reaction of the Gambians to this intelligence. In particular, we would be interested to learn if they are able to cover those individuals whilst they are in

¹ Andrew Tyrie, Roger Gough, & Stuart McCracken, *Account Rendered: Extraordinary Rendition and Britain's Role* 80 (2011).

² Craig Whitlock, *Courted as Spies, Held as Combatants*, WASH. POST, Apr. 2, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/04/01/AR2006040101465_pf.html.

³ *Id.*

⁴ *Id.* at 81.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Gambia.”¹⁴ Both telegrams carried the standard caveat that they were “for research and analysis purposes only and may not be used as the basis for overt, covert or executive action.”¹⁵

The three men finally flew to The Gambia on Nov. 8, 2002.¹⁶ MI5 then sent another telegram to the United States, providing details of their flight information and the identities under which they were traveling.¹⁷ The three, along with Al-Rawi’s brother Wahib, were arrested by Gambian authorities at the Banjul airport because of “suspicious items in their luggage” and were soon transferred to American custody.¹⁸ The British Foreign Office asked to visit el-Janoudi and Wahib al-Rawi, the British citizens, but this was denied, in violation of the Vienna Convention on Consular Relations.¹⁹ In late November 2002, the US informed Britain of its intention to transfer the four to Afghanistan, which the British protested.²⁰ That December, the two British citizens were returned to the UK and al-Rawi and el-Banna were allegedly rendered to “the dark prison” in Afghanistan, where they stayed until February of 2003, when they were sent to Guantanamo.²¹ During the 24 hour flight to Guantanamo, al-Rawi was shackled, handcuffed, and his vision was obscured by goggles.²²

Al-Rawi claims that while held in Afghanistan he was brutally beaten, subjected to humiliation, degradation, physical and psychological torture as well as long periods of sensory isolation and sleep deprivation, and frequently threatened with death.²³ While in Guantanamo, al-Rawi was kept in solitary confinement and his lights were left on 24 hours a day.²⁴ At times his air conditioning would be turned up to the maximum to make his cell “unbearably cold” and guards would take his orange jumpsuit and sheets, as well as his prayer rug if he tried to use it to warm himself.²⁵ At other times the air conditioning would be turned off for extended periods to make him stifle in the heat.²⁶ It is reported that he was given an allowance of 15 sheets of toilet paper per day, which he lost altogether when he tried to use them to cover his eyes for sleep.²⁷

Al-Rawi claims that in 2003 he was visited by an agent of MI5 while in Guantanamo who said “Sorry about all of this” and that “Alex,” “Matthew,” and “Martin” later met with him to discuss the possibility of working with MI5 again if he were released.²⁸ Al-Rawi tried to call the three of them as witnesses at a Combatant Status Review Tribunal, but when the Tribunal President contacted the British Government to that end, the UK refused to provide any information and would neither confirm nor deny that it had any sort of relationship with al-Rawi.²⁹ Al-Rawi and el-Banna claim that throughout their

¹⁴ *Id.* at 82.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Profile of Plaintiff Bisher al-Rawi*, <http://www.aclu.org/national-security/biography-plaintiff-bisher-al-rawi>.

²³ *Id.*

²⁴ Brent Mickum, *Guantanamo’s Lost Souls*, THE GUARDIAN, Jan. 8, 2007, available at <http://www.guardian.co.uk/commentisfree/2007/jan/08/post885>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Tyrie et al., *supra* note 1, at 82.

²⁹ *Id.*

captivity they were repeatedly visited by U.S. and British intelligence agents who offered them money and freedom to become informants, which they both claim to have refused.³⁰ His attorneys attempted to secure his release through the British court system in 2006 and while the court decided against them, the Treasury Solicitor informed the attorneys that the Government would approach the U.S. about his release, due to his claims of having worked for MIS.³¹ Al-Rawi was released in April 2007.³² No charges were ever filed against him.³³ In 2007, al-Rawi and four other former detainees filed suit against Jeppesen Dataplan, Inc., a Boeing subsidiary they allege supplied the CIA with “essential flight and logistical support” for rendition flights.³⁴ The suit was later dismissed and the Supreme Court denied certiorari in 2011.

³⁰ Whitlock, *supra* note 2.

³¹ *Id.*

³² *Id.*

³³ *Profile of Plaintiff Bisher al-Rawi*, <http://www.aclu.org/national-security/biography-plaintiff-bisher-al-rawi>

³⁴ First Amended Complaint at 4, Mohamed et al. v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. 5:07-cv-02798), *available at* http://www.aclu.org/files/pdfs/safefree/mohamed_v_jeppesen_1stamendedcomplaint.pdf.

EXHIBIT 3

Profile of Omar Deghayes

Omar Deghayes is a Libyan citizen who resides in Britain.¹ He lived much of his life in the UK, where his family had been granted refugee status in 1987.² His father had been a prominent lawyer and trade union activist in Libya who was reportedly tortured and murdered by the Gaddafi regime in 1980, when Deghayes was only 10 years old.³ Deghayes studied law at the University of Wolverhampton with intention of one day practicing human rights law.⁴ Deghayes, a devout Muslim, traveled through Malaysia, Pakistan, and Afghanistan after becoming curious about “life under a strict Islamic regime.”⁵ He ended up in Afghanistan, where he studied sharia law, started an import-export business and assisted NGOs.⁶ While in Afghanistan he married an Afghan woman and had a son.⁷ After the US bombing campaign began in Afghanistan, he and his family fled to Pakistan, planning to return to Britain, where his citizenship application was pending.⁸ In April 2002, he was arrested by Pakistani police in Lahore, where he was told that he was being held at the request of US authorities.⁹ The Pakistani police subsequently sold him to American forces for \$5,000.¹⁰

Once in American custody, Deghayes was held at Bagram Airfield.¹¹ He says that while imprisoned in Afghanistan the police subjected him to systematic beatings, held his head underwater until he thought he would drown, and held him in a dimly lit room full of glass boxes holding large snakes and threatened to release the snakes while he was in the room.¹² He also reports being tortured with electrical shocks.¹³ At Bagram, Deghayes says that beating and torture were “considered normal.”¹⁴ He also says he was subjected to forced nudity and prolonged food deprivation, and that he was locked in a box with very little air for long periods of time.¹⁵ He says that the guards would also force “petrol and benzene up the anuses of prisoners,” which “would burn horribly.”¹⁶ Deghayes was subsequently transferred to Guantanamo in the autumn of 2002.¹⁷ Guards in Guantanamo continued Deghayes’ abuse. He reports

¹ Andy Worthington, *The Guantanamo Files: The Stories of the 774 Detainees in America’s Illegal Prison* 168 (2007).

² *Id.*

³ Clive Stafford Smith, *Bad Men: Guantanamo Bay and the Secret Prisons* 256-57 (2007).

⁴ Worthington, *supra* note 1, at 168. Deghayes’ lawyer, Clive Stafford Smith, states that Deghayes had not completed his law exams before entering Guantanamo. Mr. Stafford Smith reports that he tried to bring legal textbooks to Deghayes while he was held in Guantanamo so he could prepare for exams in the event he was ever released but military censors prevented them, and a volume of World War I poetry, from reaching him. Stafford Smith, *supra* note 2, at 130-31.

⁵ Worthington, *supra* note 1, at 168.

⁶ Patrick Barkham, *How I Fought to Survive at Guantanamo*, THE GUARDIAN, Jan. 20, 2010, available at <http://www.guardian.co.uk/world/2010/jan/21/i-fought-to-survive-guantanamo>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Andrew Tyrie, Roger Gough, & Stuart McCracken, *Account Rendered: Extraordinary Rendition and Britain’s Role* 96 (2011).

¹² *Id.*

¹³ Vikram Dodd, *Guantanamo Man’s Family Release ‘Torture’ Dossier*, THE GUARDIAN, Aug. 10, 2007, available at <http://www.guardian.co.uk/uk/2007/aug/11/world.humanrights>.

¹⁴ Worthington, *supra* note 1, at 175.

¹⁵ Worthington, *supra* note 1, at 175.

¹⁶ *Id.*

¹⁷ Tyrie, et al., *supra* note 11, at 97.

that a guard gouged his eyes with his fingers, temporarily blinding him for several days and permanently blinding his left eye (his left eye was already slightly damaged from a childhood injury).¹⁸ He also reports experiencing mock-rapes, being routinely pepper-sprayed, and guards slamming his head against the floor.¹⁹ Other types of abuse Deghayes says he experienced in Bagram and Guantanamo include: having human excrement smeared on his face, seeing a Koran thrown in a toilet, witnessing guards severally beat other prisoners—to death in one instance, threats of execution, forced standing, various types of stress positions, being stripped naked and doused with freezing water, and “sexual abuse” (which he is reluctant to discuss in detail).²⁰

Due to his legal background, Deghayes was confrontational during his initial interviews with intelligence officers, asserting his legal rights and threatening lawsuits.²¹ Deghayes initially claimed to be his brother, who is a British citizen, but later admitted this was untrue and said that he had lied because he was afraid of being repatriated to Libya.²² While in Guantanamo, he participated in prisoner hunger strikes to protest his treatment.²³

Throughout his captivity, agents of British and American intelligence met repeatedly with Deghayes, often in attempts to get information about suspecting terrorists operating in the UK.²⁴ On September 9, 2004, while at Guantanamo, four Libyan intelligence agents met with Deghayes and interrogated and threatened him for roughly three hours, followed by a two hour interrogation two days later.²⁵ During the interrogation sessions, the Libyans referenced Deghayes’ father (who had been executed by the Gadhafi regime), accused him of working with Libyan dissidents (which he denied), claimed that Libyan exiles who had been rendered back to Libya had revealed his name under torture, and threatened him with death.²⁶

The reasons U.S. authorities give for Deghayes’ detention were that while in Afghanistan he had undergone military training and had traveled there with the help of a senior al-Qaeda figure, he was actively involved with the Libyan Islamic Fighting Group (LIFG), and that he had undertaken jihad in Bosnia and Chechnya, all of which he denies.²⁷ They supported the claim about jihad by saying they had a copy of a Chechen jihadist videotape on which he appeared.²⁸ The U.S. military refused to let Deghayes or his attorney see the video.²⁹ Eventually, his attorney was able to obtain a copy that the BBC had somehow acquired.³⁰ Both Deghayes’ brother, Taher, and an independent identification expert concluded that the person in the video was not him.³¹ Deghayes has a scar over his left eye from his childhood

¹⁸ Barkham, *supra* note 6.

¹⁹ *Id.*

²⁰ Dodd, *supra* note 11.

²¹ Tyrie, et al., *supra* note 11, at 97.

²² *Id.* at 383-86.

²³ Clive Stafford Smith, *Gitmo's Hunger Strikes*, THE NATION, Sep. 29, 2005, available at <http://www.thenation.com/article/gitmo-hunger-strikes>.

²⁴ Tyrie, et al., *supra* note 11, at 97; Stafford Smith, *supra* note 2, at 262; Worthington, *supra* note 1, at 175.

²⁵ Stafford Smith, *supra* note 2, at 258-60.

²⁶ *Id.*

²⁷ Tyrie, et al., *supra* note 11, at 97.

²⁸ *Id.*

²⁹ Stafford Smith, *supra* note 2, at 254.

³⁰ *Id.*

³¹ *Id.* at 255-56.

injury; the man in the video did not.³² A British terrorism expert later identified the man in the video as a prominent Chechen rebel named Abu Walid.³³ Even after his attorney forwarded this information to the US military, prosecutors continued use the tape to justify his detention, although they downgraded their claim and said that he was merely “suspected” of appearing in the tape.³⁴ Deghayes admits to spending three months in Bosnia, but says he was there working with the NGO Human Concern and not as a jihadist.³⁵

Deghayes was finally released in 2007 after five years of captivity. He was never formally charged with any crime. After their release, Spain sought to extradite Deghayes and Jamil el-Banna (see Profile of Bisher Al-Rawi) from the UK on the suspicion that they had been part of a Spanish al-Qaeda cell from 1999-2001 (Spain had originally made the request to US authorities in 2003 but it was ignored).³⁶ The Spanish judge later dropped the request on the grounds that further prosecution would be cruel, after a medical assessment concluded that the Deghayes suffered from Post-Traumatic Stress Disorder, severe depression, bone fractures, and displayed suicidal tendencies.³⁷ The judge, Baltasar Garzon, later opened a formal investigation into Deghayes’ treatment at Guantanamo.³⁸

³² *Id.* at 256.

³³ *Id.*

³⁴ *Id.*

³⁵ Tyrie, et al., *supra* note 11, at 387.

³⁶ Daniel Wools, *Spain: Freed Detainees too Damaged to Extradite*, AP, Mar. 6, 2008, available at <http://web.archive.org/web/20080326213007/http://www.miamiherald.com/news/world/story/446518.html>.

³⁷ *Id.*

³⁸ Giles Tremlett, *Spanish Court Opens Investigations of Guantanamo Torture Investigations*, THE GUARDIAN, Apr. 29, 2009, available at <http://www.guardian.co.uk/world/2009/apr/29/spain-court-guantanamo-detainees-torture>.

EXHIBIT 4

Military Commissions

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December 3, 2012

What are military tribunals or commissions? A military tribunal is a type of military court established to try members of enemy forces during wartime, or to try personnel in a previously hostile territory after cessation of hostilities for crimes committed during wartime or before civilian authority can be restored. Judges and members of the tribunal or commission are military officers. Members function as jurors, and their findings do not have to be based on a unanimous vote. Military tribunals are distinct from courts-martial, which try offenses committed by members of one's own military forces.

There were very few Supreme Court decisions addressing military commissions and tribunals during the first two and half centuries of our country's history. Only two of them, the *Milligan* decision immediately after the end of the Civil War and the *Quirin* decision during WWII, generally merit mention in legal commentaries.

But between 2004 and 2008, four Supreme Court decisions reviewed the jurisdiction and scope of military commissions. More decisions may be on the way, although it is thought the Supreme Court is disinclined to grant further reviews despite arguments about how its last military commission decision should be implemented in practice.

Military commissions have provided a proxy battlefield in which legal contests have been waged over more significant issues, such as

- Limitations on presidential power
- Congressional powers and oversight, in this case to authorize military commissions
- Constitutional restrictions on the power to limit the writ of habeas corpus

I would like to briefly review the historical and legal path we have travelled to reach where we are today. A number of parallels emerge as this history is reviewed, although time will not permit examination of some of the more interesting ones. For example, what happened with General Andrew Jackson after the Battle of New Orleans, and what occurred in Hawaii in WWII bear close resemblance; and what happened in the Civil War and what occurred in 2006 bear striking similarities.

We can trace our military commissions back to their English roots, with important distinctions.

English military commissions were creatures of English royal prerogative; i.e., executive power. The Crown delegated to commanders in the field, without Parliamentary intervention or sanction, the power to convene tribunals in aid of the Crown's military rule. These tribunals

administered drumhead justice with predictably arbitrary and cruel results against populations who resisted British rule. Our Founding Fathers and Americans fighting in the Revolution were among those who experienced that cruelty firsthand.

The results of arbitrary executive power were predictable.

Our Declaration of Independence identified “a long train of abuses and usurpations,” and charged King George III with “affect[ing] to render the Military independent of and superior to the Civil Power.”

Through this indictment, the new United States set forth the principle that military commanders were at all times subordinate to legislative bodies.

When our Founding Fathers gathered in Philadelphia in the summer of 1787 to find some replacement for the crippling weakness and confusion endemic in the Articles of Confederation, they brought with them fresh experience about the law of war (or the law of nations as it was then called) and tribunals.

They concluded that tribunals should be authorized by Congress. The draftsmen carried over into the new Constitution provisions that had been in the Articles of Confederation to “make rules for the Government and Regulation of the land and naval Forces.”

The drafters also provided that the Writ of Habeas Corpus, the “Great Writ” of the English common law, should be incorporated into the Constitution and be available to anyone who challenged the legality of their detention. The Constitution provides that the Great Writ could only be suspended in times of insurrection or invasion.

Now let us fast forward to the Battle of New Orleans in 1815.

General Jackson, in preparation for the battle, declared martial law to meet the challenge of the British invasion force which had landed south of the city and was marching toward the city.

After the British were defeated in the most lopsided victory of the war, a journalist questioned the continued application of martial law to the civilians of New Orleans. Jackson had the journalist arrested for inciting mutiny and disaffection in the army. The reporter’s lawyer went to U.S. District Court Judge Dominick Augustin Hall to request a writ of habeas corpus, which the judge granted after concluding that martial law could no longer be justified. Judge Hall ordered the man’s release. General Jackson then had Judge Hall arrested and placed in the same barracks as the imprisoned journalist. General Jackson charged that the judge was attempting to undermine military authority. Jackson realized that even one of his hand-picked tribunals might be reluctant to sentence a federal judge, so he ordered that the judge be marched four miles outside the city and left there. The judge made his way back to the city and waited a few days for victory celebrations to die down before convening a contempt hearing. Confirmation reached General Jackson in the meantime that the Treaty of Ghent ending the war had been signed. The treaty was actually signed before the battle was fought. General Jackson

and his aide attended the contempt hearing. The judge fined General Jackson \$1,000, a considerable sum of money in those days. General Jackson paid the fine.

Military commissions were widely used in the Civil War, with some extreme results. General Burnside, responsible for the Union disaster at Fredricksburg, was reassigned to the military district of Ohio. Once in his new command, he issued an order imposing penalties up to the death sentence on those who not only gave physical aid to the Confederacy but even expressed "sympathies" for the enemy. An Ohio Democratic Congressman, Clement L. Vallandigham was the first tried before a military commission for violating the order, after addressing a public gathering in which he questioned the need for the war. President Lincoln put aside the sentence of the tribunal which found the Congressman guilty. President Lincoln directed instead that the Congressman be brought to Confederate lines and turned over to them. The Congressman's attorney challenged the jurisdiction of military commissions to try a civilian, since civilian courts were open and available. The case reached the Supreme Court while the Civil War was still in progress. The Court punted and held that it had no jurisdiction to review the proceedings of a military tribunal.

Another opportunity to examine military tribunals reached the Supreme Court the following year, after the Civil War had ended. That case produced a key decision limiting the jurisdiction of military tribunals.

The case involved a civilian, Lambdin P. Milligan, who was a Southern sympathizer charged with planning to raid prison camps in which Confederate soldiers were held. After freeing and arming the men, he planned to use them to raid positions behind Union lines. Following his capture and trial before a military commission, he was sentenced to death. The Civil War ended before the sentence was carried out. The prisoner's lawyers, who included former Union major general and later President of the United States, James A. Garfield, challenged the jurisdiction of military commissions over a civilian. The Supreme Court agreed, and held that military commissions have no jurisdiction over citizens when courts are open and available for trial.

Military commissions were reinstituted in World War II. Martial law was declared in Hawaii after Pearl Harbor. Two forms of military courts were established to try civilians for minor and more serious offenses. One man who was detained by the military because of his German ancestry challenged the legitimacy of the commissions as did a shipyard worker, Lloyd Duncan, who was convicted of assault by a military court. He was charged with attacking two Marine guards while under the likely influence of intoxicating beverages.

Confrontation followed between the military commander of Hawaii and federal judges in Hawaii who, months after the battle of Midway, found no justification to try civilians before military commissions when the courts were open and available. The dispute over jurisdiction and the reach of the writ of habeas corpus was reminiscent of confrontations between General Jackson and Judge Hall. The Supreme Court ultimately found that Congress had not authorized the suspension or closure of civilian courts and supplant them with military tribunals. A \$100 fine imposed on the commanding general by one of the federal judges was later set aside by President Roosevelt exercising his power of pardon.

Another military commission case that reached the Supreme Court had a more troubled history and outcome. Eight German soldiers who had lived in the United States before the war went to Germany before the commencement of the war. They were drafted into the German Army. They spoke excellent English and were trained as saboteurs. Two of the saboteurs were American citizens. One team of four saboteurs landed from a submarine on Long Island and the other team landed in Florida. Each team had a list of targets it was to sabotage.

Two of the men who landed in New York, including one of the American citizens, had a change of heart and decided to turn themselves in to authorities. The FBI did not believe them at first. Only after repeated efforts did the FBI accept their story and took them into custody. The other saboteurs were picked up as a direct result of information provided by the two who surrendered. The U.S. authorities originally planned to try the men before the federal court. However, one of those who turned himself in insisted that he would tell the full story when he went to trial. This created a major problem for the authorities, since they had already taken full credit for the capture of the saboteurs without disclosing the capture had resulted from the voluntary surrender. The authorities also did not want people to know how easy it was for enemy submarines to land personnel on American shores.

Other considerations influenced the Administration's decision to change the venue for trial from federal court to military commissions. Sabotage only carried a maximum penalty of 30 years imprisonment. Roosevelt wanted the death penalty. The military commissions convened by the Administration were authorized to impose the death penalty. Roosevelt told the Attorney General that he did not want the military commissions to split any legal hairs. The Judge Advocate General was able to tell military commission panel members they could apply such rules as they saw fit since the rules applicable to courts-martial would not apply under the executive order that convened the commission.

The military commission trial was held in secret. They found the defendants guilty and imposed the death penalty on all of them, including on the two individuals who had turned themselves in and provided the government with information about the plot. Roosevelt later reduced the sentence of those two individuals to a long prison term.

Before the tribunal could reach a verdict, the Germans sought a writ of habeas corpus from the civil courts. That avenue was blocked when the Supreme Court, in *Ex parte Quirin* (1942), upheld the jurisdiction of the tribunal in very unusual circumstances that remain controversial to this day. Those circumstances prompted even Justice Scalia to note that *Quirin* did not represent the Court's finest hour. Nevertheless, *Ex parte Quirin* remained the other principal Supreme Court case on military tribunals before the recent crop of decisions in the first decade of this century.

The Modern Experience with Military Commissions.

Moving to recent history, Congress passed a joint resolution on September 18, 2001 authorizing the President to use military force against those who had attacked us on 9/11 or

aided in that attack.¹ In reliance on the AUMF, the President issued on November 13, 2001², an order establishing military commissions. The Presidential Military Commissions Order applied to any non-citizen as to whom the President had reason to believe that he or she (1) “is or was” a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States.” The military order issued by President Bush closely followed the model established by President Franklin D. Roosevelt when he created the military tribunal to try the saboteurs in the *Quirin* case.

The military commissions established solely by presidential fiat were neither sought by nor endorsed by the military, but the military is always obligated to carry out lawful orders issued by civilian authorities. The rules imposed on those presidential military commissions were shocking in so many ways, including allowing convictions to be based on evidence obtained through torture or cruel, inhuman and cruel treatment.

Two military commission cases reached the Supreme Court in 2004.

The first, *Hamdi v. Rumsfeld*, addressed an exceptional situation in which it was learned that one of the detainees was a U.S. citizen. The decision held that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.” No surprise there, thankfully.

The second decision, *Rasul v. Bush*, held that “United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.” The Bush Administration’s Justice Department had contended habeas corpus did not extend to non-citizens held beyond the confines of the United States. They had created a jurisdictional gulag and lawless zone where they believed the judicial branch had no power to interfere with their policies.

The Bush Administration set up in response to the *Rasul* decision so-called Combatant Status Review Tribunals (“CSRT”) to pass on the status of detainees, instead of using Article 5 Tribunals which are contemplated by the Geneva Conventions and were used with success in the First Gulf War. The CSRT’s attempted to create new categories of detainees not recognized by the Geneva Conventions, and lacked the authority to make the determinations contemplated by the Article 5 tribunals.

¹ Authorization for Use of Military Force, Pub. L. 107–40, §§1–2, 115 Stat. 224. (“AUMF”) authorized “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.”

² The Military Commissions Order was a comprehensive military order intended to govern the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 Fed. Reg. 57833 (referred to as the “Presidential Military Commissions Order”).

The next Supreme Court military commission case, the *Hamdan* decision in 2006, found that military commissions set up by the Bush Administration to try detainees at Guantanamo lacked "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Convention signed in 1949." Specifically, the ruling said that Common Article 3 of the Geneva Conventions was violated. Military commissions existed without Congressional authorization from 2001 until Congress passed the Military Commissions Act of 2006, following the Supreme Court decision in the *Hamdan* case.

The fourth recent Supreme Court decision, *Boumediene v. Bush*, found in 2008 that the 2006 Military Commissions Act was unconstitutional insofar as prisoners had a right to habeas corpus and the Act asserted an unconstitutional suspension of that right.

Once again, the legitimacy of military commissions was thrown into doubt.

President Obama signed the 2010 National Defense Authorization Act, which included a package of changes to the rules governing military commission proceedings. Called the Military Commissions Act of 2009, the new law replaces — and somewhat improves upon — the Military Commissions Act of 2006. The new 2009 Military Commissions Act made some cosmetic changes, including substituting the phrase "unprivileged enemy belligerent" for "unlawful enemy combatant."

There are three separate grounds under which one may be deemed an "unprivileged enemy belligerent":

1. engage in hostilities against the United States or its allies;
2. purposefully and materially support hostilities against the United States; or
3. membership in Al Qaeda.

The Taliban no longer merits special mention, as it had in earlier military commissions authorizations.

There is no age limit for those tried before military commissions. This omission may create some problems in the future as international law requires that anyone who was younger than 18 at the time of commission of an offense should be tried in a manner that takes into account the person's age and the object of rehabilitation. Commissions faced with trials of young people will need to fashion appropriate protections and a record to comply with these international legal requirements in order to defend against any attacks on their judgments.

The 2009 Act bans the use of evidence obtained through cruel, inhuman or degrading ("CID") treatment. However, it allows admission of involuntary statements made by third parties, as long as those statements were not derived from CID measures.

Statements from the accused may only be introduced if they were voluntary. The law establishes a voluntariness standard, in which the military judge is directed to look at the "totality of the circumstances." The circumstances may include, as appropriate, "lapse in time,

change in place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.”

The last element in the foregoing voluntariness standard seeks to add statutory legitimacy to the practice of sending uncontaminated FBI teams to question high value detainees, after some of the detainees had been tortured by the CIA.

The ability of the FBI teams to obtain evidence that is untainted by the fruits of torture and can be used in court may never have to be tested. Some of the highest profile defendants, including Khalid Sheikh Mohammed, made voluntary statements in CSRT hearings proclaiming their roles. Absent the ability by defense counsel to show such defendants were mentally incompetent, as a result of the torture or otherwise, at the time such statements were made, these statements together with other evidence not connected with interrogation would seem sufficient to support convictions.

Exceptions to the voluntariness standard have been established in recognition of practical constraints on the battlefield. The exception allows admission of statements made during military operations, such as may occur during questioning incidental to capture.

The “military operations” exception to the voluntariness rule appears to track on the public safety exception to the Miranda rule created by the Supreme Court in *New York v. Quarles*³.

Congress granted the commissions jurisdiction over 32 crimes in the 2009 Act. Many are standard war crimes. However, conspiracy and providing material support of terrorism are also included in the list of crimes within the jurisdiction of the military commissions. Critics of the legislation pointed out that these two crimes are not recognized as war crimes under international law. These critics assert material support and conspiracy were included only to help the government obtain convictions where evidence relating to traditional war crimes was weak or tainted by torture or cruel, inhuman and degrading treatment. These critics contend that charges not based on traditional war crimes should be brought in federal court.

These critics found support in a most unlikely place on October 16, 2012 when the DC Circuit Court of Appeals, a very conservative court which at times has openly mocked the Supreme Court decision in *Boudemediene v. Bush*, reversed Salim Hamdan’s military commission conviction for providing material support to terrorism, holding that material support was not a recognized violation of the laws of war prior to 2006 when it was codified as an offense in the MCA of that year.

³ New York v. Quarles, 467 U.S. 649 (1984), in which the Court allowed a police officer’s question without prior Miranda warning of a detained suspect in a rape assault case. The policeman asked the location of a weapon after the policeman frisked the suspect in a supermarket to which the suspect fled and found an empty shoulder holster. The Court found that the need to locate the weapon so it did not injure an innocent bystander or fall into the hands of a potential accomplice outweighed the voluntariness interests protected by the Fifth Amendment.

Interestingly, Hamdan was also charged but acquitted of conspiracy by the military commission, so that appeals court had no opportunity to pass on the legitimacy of conspiracy offenses charged in military commissions. But another military commission case working its way up the appeals ladder, *al-Bahlul*, will offer to the Court of Appeals an opportunity to pass on the legitimacy of conspiracy charges before military commissions. Critics of the government's arguments have noted the government's brief only cites domestic law in support of the view that military commissions should have jurisdiction to try conspiracy charges but fails to offer any authority from the law of war or international law in general that would support their position.

The Supreme Court in a 2004 decision, *Sosa v. Alvarez-Machain*⁴, observed that the imprecision of customary international law calls for significant caution before permitting civil or criminal liability to attach to an alleged violation. The courts in essence are saying they want clarity in the prosecution of any alleged offense of the law of nations or the law of war, and in particular that the conduct charged as being unlawful "must be based on norms firmly grounded in international law."⁵

A further criticism of the terms and application of the 2009 MCA, as with its predecessor, is the assertion that the Act has retroactive effect.

Retired Judge Advocate General flag officers, including me, have joined in an amicus brief to the Ninth Circuit, in the case of *Al-Nashiri v. MacDonald*, in which this issue is central to the appeal.

Al-Nashiri is a current Guantanamo detainee facing a range of accusations, including involvement in the bombing of the USS Cole on October 12, 2000, in which 17 sailors were killed and dozens of others injured. He is also accused of attempted attacks on another U.S. Navy ship, the USS The Sullivans, and a French ship, M/V Limburg. Al-Nashiri was captured in 2002; held for years in secret CIA prisons in Afghanistan, Thailand, and Poland; and was tortured before being sent to Guantanamo. Despite being named as an unindicted co-conspirator for the USS Cole bombings by a New York federal grand jury in 2003, al-Nashiri now faces trial and execution by military commission at Guantanamo.

This appeal is not about whether al-Nashiri should face trial and—if convicted—punishment for these crimes; he should. This case is about whether a military commission can try an individual for crimes committed outside of a theater of combat, well before there was any armed conflict. Al Nashiri is not alleged to have participated at all in the Afghanistan war or been involved in the 9/11 attacks. Whatever involvement he is alleged to have had in the USS Cole bombing and the two attempted bombings, the acts and attempted acts occurred in Yemen, well before 9/11.

⁴ 542 U.S. 692 (2004)

⁵ Hamdan II, footnote 10

Presidents Clinton and Bush both declined on separate occasions to find the U.S. was at war in Yemen in the relevant period when the USS Cole was attacked or attempts were made on the other two vessels. It was not until September 2003 that President Bush reported to Congress that combat troops had been deployed to the area, and it was not until 2009 that Congress recognized armed conflict in Yemen, relative to a rebel insurgency that began in 2004.

Military commissions, if properly constituted, have jurisdiction only to try crimes committed during armed conflict subject to the laws of war. Military commissions are not jurisdictionally empowered to try crimes committed outside of armed conflict. Our amicus brief argues that the US, acting through a convening authority at Guantanamo, cannot expand the scope of military commission jurisdiction beyond established constitutional and international law limits. We also argue that the retroactive application of the MCA to acts occurring before the commencement of hostilities, as determined by the president and Congress, constitutes a violation of the constitutional prohibition against ex post facto legislation.

Retired Flag Officers Assessments

I am part of a group of retired generals and admirals who came together with the assistance of a well regarded NGO, Human Rights First. We originally formed after revelations of the mistreatment of prisoners at Abu Ghraib, Bagram and Guantanamo. We learned this mistreatment was part of a deliberate program adopted by the Cheney/Rumsfeld regime, and supported by specious legal arguments advanced by a politicized Office of Legal Counsel in the Gonzales Justice Department. We believed these policies and programs violated the Geneva Conventions as well as our own domestic law. We were greatly concerned about the precedents these practices created, and the implications for American servicemen and women taken prisoner in future wars.

The military commissions created by President Bush at the urging of the Cheney/Rumsfeld regime were not requested or supported by the military; rather they were imposed on the military. The active duty military must obey the lawful orders of the elected civilian leadership, but those of us who were retired expressed our view as to why we thought the military commissions were a bad idea, and if they were to be used, they should be used in only the most compelling and narrow circumstances.

There are a number of reasons we thought the military commissions should not take the place of trials in the federal courts.

1. Requiring terrorists to be tried in military commissions grants them a layer of legitimacy they do not merit. Military commissions add a veneer of respectability to their claim to be warriors instead of common criminals. That is why our State Department encourages other countries to try their terrorists in civilian courts.
2. Military commissions do not have the experience to try high level terrorism cases with multiple counts of murder. Federal courts do have that experience, especially in the Northern District of Virginia and the Southern and Eastern Districts of New York. The FBI agents, the prosecution teams

and the judges have all accumulated considerable experience since 1993 in trying international terrorism cases, and we should use that experience.

3. Military commissions have not produced the results obtained by the federal courts. There have been only seven convictions in military commissions out of roughly 779 prisoners held at Guantanamo at one time or another, and who were described by Secretary Rumsfeld as the “worst of the worst.” Sixty different federal courts have convicted nearly 500 terrorists since 9/11, and 44 of those trials were in the Southern District of New York.
4. Convictions in the military commission system will be subject to years of appeals challenging the fairness of the system and jurisdictional issues such as those directed to conspiracy and material support charges, despite reforms made under the 2009 Act.
5. Foreign governments will be less willing to cooperate if cases are pursued in military commissions rather than federal courts. Our federal courts are trusted overseas. We need the cooperation of foreign governments in many of the serious cases since witnesses, documents and sensitive intelligence of possible value in prosecutions are within the control of foreign governments. We will simply not obtain the same level of cooperation if requests come from military prosecutors in commission trials compared to requests coming from U.S. Attorneys in federal court prosecutions.
6. The military commissions are a badly damaged brand, in part because of their misuse by other countries and in part because of the outrageous rules imposed on them in 2002 when they were first established by presidential executive order. Some of those rules prohibited civilian counsel from seeing evidence against their clients, and evidence obtained through torture could be admissible in some circumstances.
7. These past practices, and the images of Abu Ghraib and GITMO, are what the world and Americans who care about the rule of law remember. These practices and images have served as the most effective recruiting tools terrorists have, and have caused us great damage in the war of ideas and values in which we are engaged. American values and the American justice system are better than any alternative terrorists can offer. We should not be afraid to use these assets.
8. In summary, we should use our military to fight our wars and use our Justice Department and federal courts to try charges against alleged terrorists.

**STATEMENT OF THOMAS WILNER¹
TO THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL
RIGHTS AND HUMAN RIGHTS**

I welcome the opportunity to submit a statement for consideration by members of the Subcommittee. My colleagues and I at Shearman & Sterling have been involved in Guantanamo issues since May of 2002, when we filed a case in federal court seeking hearings for the Guantanamo detainees under the Great Writ of Habeas Corpus to determine whether there was a valid basis for their detentions. It seemed clear to us then, and it has been confirmed since, that most of the men held at Guantanamo had been connected neither with al-Qaeda nor the Taliban, but were simply innocent men taken into custody in the great fog of war. The great majority had not been captured on any battlefield or taken into custody by U.S. troops; rather, they were turned over to U.S. forces by Pakistani and Northern Alliance tribes people in exchange for substantial bounties paid for any “Arab terrorist.” Every Arab in the area was a “valuable commodity” who could be sold for cash, and every Arab sold was then simply shipped off to Guantanamo, without any review or hearing beforehand. Most remained imprisoned there for years without any opportunity to see their families or to obtain justice.

Thankfully, the population at Guantanamo has been reduced substantially over recent years, but the injustice still persists. More than half of the prisoners there were cleared for release three and a half years ago – but they remain imprisoned. In a desperate cry for justice, most are now on hunger strike.

¹ Mr. Wilner and his colleagues at Shearman & Sterling LLP filed a case in May of 2002 seeking hearings for the Guantanamo prisoners under the Writ of Habeas Corpus. He was counsel of record for Guantanamo detainees in *Rasul v. Bush/Al-Odah v. United States* (2004) in which the U.S. Supreme Court held that the detainees had a statutory right to habeas corpus, and in *Bomediene v. Bush/Al-Odah v. United States* (2008), in which the Supreme Court held that the detainees’ right to habeas corpus was protected to the U.S. Constitution. He was also counsel of record in the decision issued by the U.S. District Court in October 2004 establishing the Guantanamo detainees’ right to unmonitored and privileged access to counsel.

Their continuing imprisonment is a terrible tragedy for them, and for all the innocent men who have been held at Guantanamo without recourse to justice over the years. I have visited the base 15 times over the years, and have had to tell individual prisoners that their mother or father or grandmother or grandfather or brother or sister had died while they were incarcerated, and sit there and watch them cry knowing that they would never see their loved ones again and had missed the last opportunity to be with them. I can never put in words how horrible that experience is.

1. Guantanamo hurts our nation every day it remains open.

Our country is paying a very high price for all this. Guantanamo is by far our nation's most expensive prison, costing in excess of a million dollars per year for each detainee. That compares, by the way, to an annual cost of about \$30,000 per prisoner in a U.S. maximum security prison. We are spending about \$90 million a year just to jail the 86 prisoners who were cleared for release three plus years ago. The \$300 million we have spent jailing that group the past three and a half years, and the annual cost of keeping Guantanamo open, amount to a lot of money that can be used to save key jobs and services being cut as a result of the sequester. How many teachers' salaries, how many school lunches, how many marines would those millions of dollars pay for? And the cost of keeping Guantanamo open is increasing. The military has requested nearly \$200 million for capital improvements to keep it functioning as a prison. Every Congressperson concerned with costs should want to close this prison.

But the cost to our nation is much more than economic. As the President has pointed out, the Guantanamo prison was established for the sole purpose of avoiding the rule of law, and it remains a symbol around the world of disregard for the law. I challenge anyone who contends that Guantanamo makes us safer. To the contrary, a long line of people responsible for our

national security, including Colin Powell, David Petraeus, Dennis Blair, and Leon Panetta, as well as a host of senior generals, have pointed out that Guantanamo hurts our national security. Pictures of Guantanamo are still used today by al-Qaeda to recruit suicide bombers against the United States and its allies. As the President has said, Guantanamo has “created more terrorists around the world than it ever detained.”

The President has succinctly summarized what must be done:

“We’ve got to close Guantanamo . . . Guantanamo is not necessary to keep America safe. It is expensive. It is insufficient. It hurts us in terms of our international standing. It lessens cooperation with our allies on counterterrorism efforts. It is a recruitment tool for extremists. It needs to be closed.”

I agree completely. But closing Guantanamo will take more than words. It requires action – and the courage to take that action even in the face of criticism and political risk.

2. The President has the power now to transfer most of the detainees out of Guantanamo.

Existing law gives the President authority to transfer detainees from Guantanamo to other countries free from congressional restrictions:

- a) Section 1028(d) of the NDAA provides the President with a clear avenue to transfer detainees to other countries. Section 1028(a) prohibits transfer unless the Secretary of Defense issues a certificate personally ensuring that the transferred detainee cannot engage in any terrorist activity in the future, something that is impossible to do. Section 1028(d) then allows the Secretary to waive that requirement and to transfer the detainee to another country if he finds that the actions to be taken by the receiving country will “substantially mitigate” the risk that the detainee will engage in terrorist activity in the future and that the transfer is in U.S. national security interests.

Those are quite makeable findings. The President has already stated publically that it is in the U.S. national security interest to transfer all the detainees from Guantanamo. Moreover, the countries willing to accept detainees have offered to undertake steps to substantially mitigate the risk that a transferred detainee will engage in terrorist activity in the future. In any event, even were there no congressional restrictions at all, the findings the administration is required to make now under this provision are what it would do as a political matter anyway – so that it can tell the public that steps are indeed being taken to minimize the risk that released detainees will engage in terrorism in the future. Nothing but fear of political criticism is blocking the administration from making those findings now so that detainees can be transferred.

- b) There is another exception from the congressional restrictions on transfers. Section 1028(a)(2)) authorizes the Secretary to make transfers to effectuate court orders. The Secretary may therefore transfer a detainee to effectuate an order granting habeas. By consenting to such orders in appropriate cases, or not appealing habeas orders entered by district courts, the Department of Justice would effectively authorize transfers free from congressional restrictions. Yet, the administration had made no attempt to take advantage of that opening. Instead, its lawyers at the Department of Justice have automatically opposed every habeas petition and appealed every district court order they have lost in order to take advantage of the DC Circuit's absurdly strict standard on habeas. The Attorney General should reexamine that policy. If the administration really wants to close Guantanamo, it could simply consent to the entry of orders granting habeas or ordering the release or transfer of detainees. It could do that now.

c) There are plenty of countries that would take the detainees.

One of the prevailing myths about Guantanamo is that we can't find countries to take the detainees. That is wrong. Although we have refused to take any detainees ourselves, other countries will. State Department officials have confirmed to me that there were more than enough countries willing to take the detainees; the problem was getting the administration to send them. As mentioned, the countries willing to accept detainees are also willing to undertake steps to mitigate the risk that the detainees will engage in terrorist activity in the future.

d) Fewer than 30 of the detainees at Guantanamo are considered potentially "significant" threats. The others are not, and can and should be transferred promptly out of Guantanamo.

166 detainees remain at Guantanamo; 86 of them have been "cleared" for more than three and a half years. They should be transferred promptly to other countries.

What about the others? The press and some in the administration have tended to characterize all the others at Guantanamo as people who can't be tried but are "too dangerous to release." In fact, that is clearly not the case. These detainees are not all the same; fewer than 30 of them are considered significant threats; the others are clearly not.

It is useful to break them down into categories:

- a) 86 have been cleared for transfer. 56 of those are from Yemen. Thankfully, the President is apparently lifting his self-imposed ban on transfers to Yemen. Yemen wants them back and is willing to accept the condition that they go into a rehabilitation center. Saudi Arabia is willing to build and, if necessary, staff such a center. This can all be done in a short time. The other 30 cleared should not be a

problem. Some, like the UK resident and those from Tunisia, could return to their home countries. Others, like the 4 Syrians and 3 Uighurs still there, would need to go to third countries. But that should also not be a problem. Countries are willing to accept them.

- b) 80 have not been cleared. As mentioned, they are not a monolithic group, but very different people. One must remember that most of the Guantanamo detainees were picked up soon after 9/11 in or around Afghanistan. They included people suspected of being associated with either al-Qaeda or the Taliban (even if they opposed al-Qaeda). There was no review and no effort to pick up only high-level leaders. In fact, most of the leaders are known to have escaped, and those rounded up were low level foot soldiers as well, of course, as a lot of innocent Arabs who happened to be in the area at the time.

Significantly, it was generally recognized by the summer of 2004 that the detainees who were at Guantanamo at that time were not significant players. As Tim Golden and Don Van Natta, Jr. Pointed out in an article in *The New York Times* on June 21, 2004: <http://www.nytimes.com/2004/06/21/world/the-reach-of-war-us-said-to-overstate-value-of-guantanamo-detainees.html?pagewanted=all>

"In interviews, dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East said that contrary to the repeated assertions of senior administration officials, none of the detainees at the United States Naval Base at Guantánamo Bay ranked as leaders or senior operatives of al-Qaeda. They said only a relative handful – some put the number at about a dozen others more than two dozen – were sworn Qaeda members or other militants able to elucidate the organization's inner workings."

That is very important. What it means is that those who were already at Guantanamo in the summer of 2004 were not significant players and really do not pose a

significant threat. (The only possible exceptions are two men who were convicted in trials by military commission, and a Saudi who was sent to Guantanamo late in 2003 from a "black site" and had charges filed against him.) The others, at most, were low level foot soldiers. In fact, many of them probably had no connection at all with al-Qaeda or the Taliban. I can tell you that two Kuwaitis are among the 80 who have not been cleared. I have seen the "evidence" against them and it is absurdly flimsy, contradictory on its face and simply not credible. I truly believe they are totally innocent. They are clearly not dangerous people.

In any event, **whatever potential threat exists among the population at Guantanamo comes not from those men, but from the detainees who were transferred there after the summer of 2004.** It was after that when the Bush administration began transferring prisoners from so-called "black sites" far from the conflict in Afghanistan. Ten prisoners arrived in September 2004 from "black sites," 14 more – the "high-value detainees," including KSM etc. – in September 2006, and five more in 2007-08, two of whom are regarded as "high-value detainees." So, in total, 29 prisoners were transferred to Guantanamo after August, 2004. Some have actually been released. One was convicted in U.S. court and is now incarcerated here, and one pled guilty in his trial by military commission. I understand that 22 of the 29 remain and are considered potential threats.

These, along with the Saudi mentioned earlier and the three who have been convicted in trials by military commissions – 26 men in total – represent the universe of potentially significant dangerous detainees at Guantanamo. The others are not. In other words, the other 54 of the 80 who have not yet been cleared are simply not

significant players and can and should be transferred. They should be cleared for transfer by the Periodic Review Board, which will hopefully begin soon. Again, these men can go to their home countries (Kuwait has built a rehabilitation center to accommodate its citizens and potentially others) or to other countries which will accept them.

c) What do we do with the 26 or so potentially significant bad guys at Guantanamo?

Certainly, Guantanamo – with its massive costs in both dollars and loss of U.S. prestige – should not be kept open just to try and incarcerate these 26 people. U.S. legislation does now prevent the administration from moving any detainee from Guantanamo to the U.S. I strongly support the proposed amendments to the NDAA dropping that restriction so that these men can be tried in the United States.

Certainly, if we could try Whitey Bulger, Charles Manson and the Blind Sheikh in the United States, we are able to try, and to incarcerate, these other men in the United States. We have nothing to fear, except our own reticence.

What should we be doing now?

First, the President should move immediately and aggressively to use his existing authority to transfer the cleared detainees out of Guantanamo. There is no excuse for further delay.

Second, the majority of the other detainees at Guantanamo who have not yet been cleared – those who were at Guantanamo in the summer of 2004, before the Bush Administration began transferring “high-valued detainees” from other sites – should also promptly be reviewed and transferred out of Guantanamo to the many countries willing to accept them.

Third, the relatively few remaining detainees at Guantanamo who are truly considered as potential threats should be transferred to the United States for trial and, if convicted, for incarceration. Congress should enact the proposed amendments to the NDAA allowing that to happen.

In summary, we can begin closing Guantanamo immediately. The President has the existing authority to do so. I recognize that there is always a potential risk that a released prisoner can do something bad in the future. Every judge and every governor faces that risk when he releases a prisoner. And there is no doubt, if that happens, the person or political party who has ordered the release could be subject to political criticism. But we cannot let that fear stop us from doing what is right. The 86 cleared prisoners, who are crying for justice through their hunger strike, should be released immediately. How do you explain to them that, even though they are cleared, they must remain in prison because it is politically inconvenient to let them out. How do you explain to the world that we must keep Guantanamo open, even though it violates the rule of law and compromises our and our allies' efforts to combat terrorism, because we are afraid to take on the domestic political criticism for closing it. This President must have the political courage to follow-up his words with firm actions. Further delay is not tolerable.

* * *

Testimony of
 Matt Hawthorne, Policy Director
 National Religious Campaign Against Torture,
 Submitted to:
 The Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights, and
 Human Rights
 Hearing entitled: "Closing Guantanamo: The National Security, Fiscal, and Human
 Rights Implications"
 July 24, 2013

Mr. Chairman, Members of the Subcommittee, thank you for this opportunity to submit testimony on behalf of the National Religious Campaign Against Torture (NRCAT). The National Religious Campaign Against Torture is a coalition of denominations, faith groups and religious organizations that have joined together in an effort to ensure that the United States treats prisoners humanely, and in particular, that it never engages in torture, cruel, inhuman, or degrading treatment. Since it was formed in 2006, more than 320 religious organizations have joined NRCAT, including representatives from the Catholic, mainline Protestant, evangelical Christian, Muslim, Jewish, Hindu, Sikh, Buddhist, and Orthodox Christian communities. NRCAT members include national denominations, as well as regional religious organizations and congregations.

The detention center at Guantanamo Bay was created in an attempt by our government to hold prisoners outside of the rule of law and hidden from the eyes of the American people. It is a place where prisoners were tortured, and it remains a place where well over 100 people are held without charge or trial, let alone conviction, for any crime. Some of the detainees in Guantanamo have been held there for over a decade, and many of the prisoners currently there were cleared to leave Guantanamo more than three years ago.

The right to a trial is bedrock in American values, and it is a national disgrace that our government has abandoned that value for detainees in Guantanamo. Worse, our government tortured some of those prisoners – an act that is abhorrent in the teachings of all faiths. Acts of torture that were previously authorized for use in Guantanamo include: stress positions, prolonged isolation, deprivation of food, sleep deprivation, exposure to cold temperatures, and waterboarding.¹

Out of desperation and despair over their seemingly permanent imprisonment without trial or hope of release, many detainees at Guantanamo joined a hunger strike that has lasted since early this year. Although the number of detainees on hunger strike has fluctuated, the Department of Defense has reported force-feeding over 40 Guantanamo detainees. While life preserving, this procedure, which involves forcing a plastic tube up

¹ The Constitution Project. *The Report of The Constitution Project's Task Force on Detainee Treatment*. Washington, 2013. See pages 55-56.

a detainee's nose and then down his throat into his stomach, is both brutal and dehumanizing. The use of force-feeding is yet another of the harmful results of our government's failure to close the detention center at Guantanamo.

Leaders of several of the largest American denominations and senior leaders of many other religious organizations recently released a letter they sent to President Obama, stating: "The hunger strike at Guantanamo is an ongoing humanitarian crisis – caused in large part by the despair prisoners at the detention center feel over their continued detention without hope of trial. It is past time for our country to deal with that crisis."²

Bishop Pates, Chair of the Committee on International Justice and Peace at the U.S. Conference of Catholic Bishops, recently wrote to Secretary of Defense Hagel, saying that "the indefinite detention of detainees is not only injurious to those individuals, it also wounds the moral reputation of our nation, compromises our commitment to the rule of law, and undermines our struggle against terrorism."³

The Administration currently has the authority to transfer many of the 86 detainees who are cleared out of Guantanamo. This is the first step toward closing the Guantanamo detention center, and President Obama should ensure that these transfers occur as expeditiously as possible.

Congress should assist in the effort to close Guantanamo. S. 1197, the current Senate version of the National Defense Authorization Act for Fiscal Year 2014, lowers the legal barriers to transferring cleared detainees, enables transfers for trial and for medical treatment, allows transfers for those who have been acquitted or served out their sentences post-trial, and provides a path for transferring other detainees out of Guantanamo. These measures are reasonable and appropriate, and should be supported.

Americans of all faiths believe that their country ought to be both strong and just. The detention center at Guantanamo Bay is an example of neither strength nor justice. It is morally wrong for our government to continue to imprison people without any trial on land leased from a foreign government, after years of torture. The situation at Guantanamo harms our reputation around the world, where it is used as a symbol to strengthen the ranks of those who oppose us. Worse, it exacts a continued moral cost on our government and makes hypocrites of us when we try to stand for American ideals such as the rule of law and the right to trial.

On behalf of the National Religious Campaign Against Torture, I am grateful to the Subcommittee for holding this important hearing. It is time to close Guantanamo. It is the morally right thing to do.

² Letter to President Obama on Guantanamo from Religious Leaders on July 12, 2013.

http://www.nrcat.org/storage/documents/letter_on_guantanamo_to_president_obama_071213_2.pdf

³ Letter to President Obama from Bishop Richard E. Pates on June 25, 2013. <http://www.usccb.org/issues-and-action/human-life-and-dignity/torture/upload/Pates-ltr-to-DOD-Hagel-re-Guantanamo-2013-06-25.pdf>

Testimony of Rabbi Rachel Kahn-Troster

Director of North American Programs

T'ruah: The Rabbinic Call for Human Rights

Mr. Chairman, Members of the Subcommittee, thank you for this opportunity to submit testimony on behalf of T'ruah: The Rabbinic Call for Human Rights concerning the moral imperative to close the prison at Guantanamo Bay in Cuba, and transfer or hold trials for the prisoners who remain there. As a human rights activist, I believe it is critical that the United States immediately address the situation.

T'ruah: The Rabbinic Call for Human Rights is an organization of more than 1800 rabbis from all streams of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Grounded in Torah and our Jewish historical experience and guided by the Universal Declaration of Human Rights, we advocate for human rights in Israel and North America. We were founding members of the National Religious Campaign Against Torture and continue to be its most active Jewish voice. Our rabbis, together with their Jewish communities, believe that core American values such as the prohibition against torture, the right to a fair trial, and humane conditions of imprisonment are the moral bedrock on which our country succeeds or fails. Upholding these values is an extension of our Jewish values: our ancestors came to the United States because of its commitment to justice and liberty.

President Obama's first day in office in 2009 was one of my proudest as an activist. I watched online as the President signed Executive Orders that appeared to reverse the moral quagmire in which America had found itself since the beginning of the War on Terror. One of those Executive Orders authorized the closing of the prison at Guantanamo within the year. Like most Americans, I trusted that it would happen. But it has not, both because of roadblocks set up by Congress and because of presidential inaction. It has been easy for most of America to forget the men languishing at Guantanamo. Early in his first term, President Obama urged us all to look forward on issues like torture and indefinite detention. Most of us did.

It is especially upsetting that the men held in Guantanamo have so despaired of ever leaving that many of them have been engaged in a hunger strike for months. The leaders of this strike are many of the 86 men cleared for release—men whom the United States has admitted it should no longer be holding captive—who are still held at Guantanamo. In response to their abstention from food, the military has been force-feeding them, restraining them in chairs while thrusting feeding tubes down their noses and throats. It is only religious sensitivity in the most superficial sense that has prompted the military not to forcibly feed the prisoners during daylight hours for the duration of Ramadan. It is cruel that the military reclassified being on hunger strike as grounds for being held in isolation, thereby forcing prisoners to choose between the Ramadan prayers that must be done communally and their act of protest.

As an anti-torture activist, I am frequently exposed to information about the gruesome nature of inhumane treatment, but reading the descriptions of force-feeding has tested my limits. Even though I applaud actor and hip hop artist Yasiin Bey (Mos Def) for his willingness to submit to force feeding on video to demonstrate just how brutal this practice is, I can't watch. The consensus of both medical and human rights officials is that force-feeding hunger strikers is torture. Is this where we as a nation find ourselves again?

No human being, created *b'tzelem elohim* (in the image of God), should have to submit to this inhumanity in order for the world to see his or her suffering. One of the first laws that God gives humanity, according to the Torah, is the obligation to set up fair courts of justice. Jewish law—like American law—guarantees every person accused of a crime the right to stand trial, and to be judged fairly.

In the Book of Lamentations, which the Jewish community read last week on the fast day of Tisha B'Av, the desolate people ask why God has forsaken them. But in the case of the hunger strikers at Guantanamo, it is we the people who have done the forsaking. These men have been waiting as our attention went elsewhere.

In December 2008, right after President Obama was elected, two attorneys representing Guantanamo detainees spoke at a T'ruah conference, and their words have come back to haunt me with each day of the hunger strike, with each day that the prison remains open. Attorney Thomas Wilner said that to the detainees, the worst abuse was not the physical abuse, but being stuck in Guantanamo without a hearing, without a chance to defend themselves. And Gita Gutierrez of the Center for Constitutional Rights called out all Americans, herself included, on our complacency, first in the face of the torture we knew was going on and now in light of the ongoing legal quagmire. She challenged us: "We did not do enough eight years ago, we did not do enough six years ago, or four years ago, or even two years ago, and the men are still imprisoned there." She reminded us that even being released did not restore to former prisoners the years that were lost or heal the physical and emotional trauma. And she asked us to commit to getting those men released.

That was more than 1,600 days ago. The men are still there and now they are dying to remind us they are there.

After the Israelites receive the Torah, they famously declare *Na'aseh v'nishmah*, "We will do and we will hear" (Exodus 24:7). The odd choice of order of the commitment is understood to mean that a commitment to action must precede a full comprehension of the terms. The moral imperative to act, to receive God's word, is so great that it ends discussion.

We've heard enough about and from men dying at Guantanamo. It's all been talk. The balance of this dynamic must change to action. Recently, Thomas Wilner told me, "What is happening at Guantanamo is simply no longer tolerable. It is a terrible human tragedy, and it is also a continuing outrage to our values as Americans. These few Arab men, many of whom have long been cleared, are stranded at an island prison and ignored because they have no domestic constituency to speak on their behalf—except for us. We must do so."

It is time for the United States to act. On May 23, President Obama once again reiterated his commitment to close the prison and transfer to their home countries the detainees who have been cleared for release. At the time, he emphasized the troubling moral legacy that both the hunger strike itself and the bigger problem of indefinite detention without trial will leave to the next generation: "Is that who we are? Is that something our founders foresaw?...Our sense of justice is stronger than this."

While the president continues to state his commitment to closing Guantanamo, his actions tell a different story, as he continues to sign legislation that restricts his ability to transfer detainees and fails to robustly pursue other options. T'ruah's leadership are among 38 faith leaders who signed a recent letter to President Obama from the National Religious Campaign Against Torture reiterating that both torture and indefinite detention without trial—especially for the significant number of detainees cleared for release—violate the inherent dignity of the human being. The letter states: "As the nation's most visible and painful symbol of torture and indefinite detention, Guantanamo Bay is a constant reminder of a deep moral wound that will heal only when it is permanently closed."

Mr. Chairman, Members of the Subcommittee, T'ruah believes closing Guantanamo not just a legal but also a moral obligation. While there is much the President could do on his own, it has not aided these efforts that Congress continues to set up roadblocks to closing Guantanamo and either trying or releasing its prisoners. To that end, we urge you to take immediate steps to end Congressional restrictions on closing Guantanamo and on trying its prisoners in American courts. Today's hearing represents the first step in Congress restoring its legacy on this issue. We thank you for your leadership and for the opportunity to contribute.

CLOSING GUANTÁNAMO:
THE NATIONAL SECURITY, FISCAL, AND HUMAN RIGHTS IMPLICATIONS
Hearing Before the Senate Judiciary Subcommittee on
the Constitution, Civil Rights, and Human Rights
Wednesday, July 24, 2013

Statement of Stephen I. Vladeck
Professor of Law and Associate Dean for Scholarship,
American University Washington College of Law

Mr. Chairman, Ranking Member Cruz, and distinguished members of the Subcommittee,

Thank you for the opportunity to submit the following statement for the record. Although my academic research and scholarship have focused on a wide range of issues implicated by this hearing,¹ I'd like to focus in the pages that follow on three specific points: *First*, it is going to be all-but-impossible, *as a matter of law*, to try most of the remaining Guantánamo detainees in military commissions. Thus, whatever else may be said about arguments for keeping Guantánamo open, any claim that future military commission trials justify such a step fails to persuade. *Second*, and related, it is unlikely, at least based on current jurisprudence, that the detainee population will be substantially reduced by habeas corpus litigation before the D.C. federal courts. As one of the D.C. Circuit's own judges recently lamented, the courts are not going to close Guantánamo; only the political branches can.²

Third, criticisms of the ability of our ordinary ("Article III") civilian courts to handle high-profile terrorism cases are wanting for evidence. Not only are the civilian courts more than able to handle the challenges of high-profile terrorism cases, but various developments over the past decade have only made it *easier* for the government to bring such cases before our regular courts. Simply put, there should not be any relationship going forward between the fate of Guantánamo and the question of where and how to try terrorism suspects.

I. HAMDAN II AND MILITARY COMMISSIONS GOING FORWARD

Congress enacted the Military Commissions Act of 2006 (MCA), as amended in 2009,³ in response to the Supreme Court's decision in *Hamdan v. Rumsfeld*

1. See, e.g., Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (analyzing the role of history in the Guantánamo habeas cases); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107 (2009) (deconstructing the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008)); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS 933 (2007) (discussing the implications of the Supreme Court's decision in *Hamdan I—Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

2. See *Hussain v. Obama*, No. 11-5344, 2013 WL 2990993, at *8 (D.C. Cir. June 18, 2013) (Edwards, J., concurring in the judgment).

3. See generally 10 U.S.C. §§ 948a–950t. For more on how the 2009 MCA altered the scheme created in the 2006 MCA, see Stephen I. Vladeck, *Exceptional Courts and the Structure of American Military Justice*, in *GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE AND POLICY PERSPECTIVE* 163 (Fionnuala D. Ni Aoláin & Oren Gross eds., Cambridge Univ. Press 2013).

(“*Hamdan I*”), 548 U.S. 557 (2006).⁴ In *Hamdan I*, the Supreme Court held that Congress, through Article 21 of the Uniform Code of Military Justice (UCMJ), had only authorized military commission trials for “offenders or offenses that by statute or by the law of war may be tried by military commissions.” And a plurality of the Court further concluded that conspiracy was not such an offense. Thus, Congress had not authorized Hamdan’s trial by military commission.

Congress responded to *Hamdan I* in the MCA by providing express authorization for military commission trials of non-citizens who were “unlawful enemy belligerents,” as defined by the MCA. To that end, Congress codified 28 separate substantive offenses triable by commissions, *including* conspiracy and “providing material support to terrorism” (“MST”). The MCA further provided that its provisions “codify offenses that have traditionally been triable by military commissions,” and “does not establish new crimes that did not exist before its enactment.”⁵

Hamdan was subsequently convicted of MST (although the commission acquitted him of conspiracy). In a different proceeding, another detainee—Ali Hamza Ahmad Suliman al Bahlul—was convicted of conspiracy. Both appealed to the “Court of Military Commission Review” (CMCR), an intermediate court created by the MCA. The CMCR affirmed both convictions,⁶ and appeals to the D.C. Circuit followed.

In *Hamdan v. United States* (“*Hamdan II*”), 696 F.3d 1238 (D.C. Cir. 2012), the D.C. Circuit reversed Hamdan’s conviction. At the heart of the court’s unanimous opinion, authored by Judge Brett Kavanaugh, was the conclusion that the MCA should be interpreted to *not* apply retroactively—to not authorize trials for conduct that pre-dated its October 2006 enactment. This was so, Judge Kavanaugh explained, because otherwise, it would raise serious constitutional concerns under

4. For full disclosure, I served as co-counsel to Hamdan before the Supreme Court in *Hamdan I*. I have not been directly involved in his case since 2008, and my observations here come purely in my personal capacity.

5. For a more detailed summary of the 2006 MCA, and the constitutional questions it raises, see Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SEC. L. & POL’Y 295, 326–28 (2010).

6. See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (Ct. Mil. Comm’n Rev. 2011); *United States v. Hamdan*, 801 F. Supp. 2d 1247 (Ct. Mil. Comm’n Rev. 2011).

Article I's Ex Post Facto Clause.⁷ Thus, the only way Hamdan could be prosecuted in a military commission for MST⁸ based upon pre-MCA conduct was if such a trial was authorized by the only *other* authority for military commissions, and the only one on the books at the time of Hamdan's conduct—Article 21 of the UCMJ, 10 U.S.C. § 821. Holding that offenses triable under Article 21 must be clearly established violations of the *international* laws of war, *Hamdan II* next concluded that MST was *not* a recognized violation of the laws of war at the time of Hamdan's conduct. Thus, neither the MCA nor Article 21 authorized Hamdan's trial, and so his conviction had to be reversed.

As I've explained elsewhere,⁹ and as the government subsequently conceded,¹⁰ Judge Kavanaugh's analysis compelled the same conclusion with regard to whether the MCA authorizes military commission trials for *conspiracy* based upon pre-MCA conduct. Because neither MST nor conspiracy were clearly established violations of the laws of war prior to the MCA's enactment, neither offense can be tried in a military commission for conduct that also predated the MCA. And so the D.C. Circuit ruled in January of this year.¹¹ And, to drive the point home, virtually all of the Guantánamo detainees were captured and sent to Guantánamo before the MCA was enacted—and are held based upon pre-MCA conduct. Simply put, so long as *Hamdan II* is the law, the commissions will not be able to try *any* of the current Guantánamo detainees for MST or conspiracy.¹²

7. See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). There can be little question that the Ex Post Facto Clause *applies* at Guantánamo; unlike individual rights, there is no authority for the proposition that Congress may pass ex post facto laws so long as they only affect non-citizens detained outside the territorial United States. See, e.g., *Boumediene v. Bush*, 476 F.3d 981, 996–97 (D.C. Cir. 2007) (Rogers, J., dissenting).

8. To be clear, material support has been a *civilian* criminal offense since 1994, and has applied extraterritorially since the USA PATRIOT Act of 2001. See *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism* (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 805(a)(1)(F), 115 Stat. 272, 377 (2001) (amending 18 U.S.C. § 2339A(a)). Thus, there is no question that the *civilian* courts can entertain material support prosecutions so long as the conduct giving rise to the offense post-dated October 26, 2001.

9. See Steve Vladeck, *Three (Early) Observations on Judge Kavanaugh's Analysis in Hamdan*, LAWFARE, Oct. 16, 2012, <http://www.lawfareblog.com/2012/10/three-observations-on-judge-kavanaughs-analysis-in-hamdan/>.

10. See Steve Vladeck, *The Government's Supplemental Brief in Al-Bahlul*, LAWFARE, Jan. 9, 2013, <http://www.lawfareblog.com/2013/01/the-governments-supplemental-brief-in-al-bahlul/>.

11. See *Al Bahlul v. United States*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (*per curiam*).

12. The D.C. Circuit has since granted the government's petition for rehearing en banc, see *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Apr. 23, 2013) (*en banc*), and argument is scheduled for September 30, 2013. But as most commentators agree, it is unlikely, given the membership of the

The reason why this point is so significant is because, other than the 9/11 trial and the *Nashiri* prosecution (arising out of the bombing of the *USS Cole*), MST and conspiracy are the principal—if not exclusive—charges that the government could theoretically pursue against the detainees in a military commission. This is so because, at least based upon the public record, only the 9/11 defendants and *Nashiri* can be tied directly to specific acts of terrorism, as opposed to more general ties to al Qaeda and its affiliates. Thus, as a June 2012 *Reuters* story suggested, even the commissions' Chief Prosecutor, General Mark Martins, has all-but assumed that there will be no additional commission trials once the 9/11 and *Nashiri* prosecutions have concluded.¹³

To be sure, the above analysis is without regard to whether commissions could be used to try *future* terrorism suspects—a question that raises its own host of thorny constitutional issues.¹⁴ But at least for the existing detainee population at Guantánamo, the upshot is that trials by military commission will be *legally* unavailable to everyone besides the 9/11 defendants and *Nashiri*.

II. THE STATE OF THE GUANTÁNAMO HABEAS LITIGATION

Just as military commission trials seem unlikely to have any effect on the current Guantánamo detainee population (outside the 9/11 and *Nashiri* cases), the same can be said—albeit for different reasons—about the ongoing Guantánamo habeas litigation in the D.C. federal courts. This conclusion may seem a bit counterintuitive given the relative success of the detainee litigation to date—in the

court and the specific questions the en banc court asked to have briefed, that the en banc court will reverse course and *uphold* the ability of the commissions to try MST and conspiracy for pre-2006 conduct. See, e.g., Wells Bennett & Benjamin Wittes, *Breaking News: D.C. Circuit Grants En Banc Rehearing in Al-Bahlul*, LAWFARE, Apr. 23, 2013, <http://www.lawfareblog.com/2013/04/breaking-news-d-c-circuit-grants-en-banc-rehearing-granted-in-al-bahlul/>.

13. See Jane Sutton, *United States Scales Back Plans for Guantanamo Prosecutions*, REUTERS, June 11, 2013, <http://uk.reuters.com/article/2013/06/11/uk-usa-guantanamo-idUKBRE95A0P320130611>.

14. In *Hamdan II*, Judge Kavanaugh (writing only for himself) suggested that there was no problem with *prospective* prosecutions for MST and conspiracy. See *Hamdan II*, 696 F.3d at 1246 n.6. But even if that's true with regard to Congress's power to define the offense, there are still difficult questions about whether military commissions may try offenses not recognized as war crimes without violating the jury-trial provisions of Article III and the Fifth and Sixth Amendments. See, e.g., Steve Vladeck, *Article III Limits on Military Commissions: The (New) NIMJ Amicus Brief, and the En Banc D.C. Circuit*, LAWFARE, June 12, 2013, <http://www.lawfareblog.com/2013/06/article-iii-and-military-commissions/>.

district court, 38 of the 63 detainees who have pursued habeas relief since the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), have prevailed on the merits.¹⁵

But that statistic doesn't account for the D.C. Circuit's jurisprudence, which, in at least five respects, has made it far easier for the government to prevail on the merits. *First*, the Court of Appeals has adopted a capacious definition of what it means for a detainee to be "part of" al Qaeda or one of its affiliates, and therefore subject to detention under the September 2001 Authorization for the Use of Military Force (AUMF).¹⁶ *Second*, the Court of Appeals has suggested that international law, which the Supreme Court has twice used to interpret the AUMF, has no bearing on the scope of the detention authority Congress has provided.¹⁷ *Third*, the court has held that the government need only prove that a detainee *is* "part of" al Qaeda or one of its affiliates by a "preponderance of the evidence," *i.e.*, more than half.¹⁸ *Fourth*, and related, the D.C. Circuit has held that courts applying these first two rules should resort to "conditional probability analysis,"¹⁹ even though such analysis could have the effect of giving undue value to evidence gathered from similarly unreliable sources.²⁰ *Fifth*, the court has also articulated a "presumption of regularity" for intelligence reports,²¹ which has made it virtually impossible for detainees meaningfully to rebut the government's evidence—despite the Supreme Court's suggestion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that such an

15. For an overview of the post-*Boumediene* litigation, including the decisions discussed below, see Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011).

16. See *al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2011).

17. See *id.* But see *al Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2011) (Sentelle, C.J., and Ginsburg, Henderson, Rogers, Tatel, Garland, & Griffith, JJ., concurring in the denial of rehearing en banc) ("We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.").

18. See *al Bihani*, 590 F.3d at 879. As I've explained in detail elsewhere, the D.C. Circuit's approach to the process to which detainees are entitled is based on a fundamentally backwards reading of Justice Kennedy's majority opinion in *Boumediene*, which stressed that detainees are entitled to *more* process in challenging executive detention than what is ordinarily available in post-conviction habeas petitions. In *al-Bihani*, the D.C. Circuit—inexplicably—held that they are entitled to *less*. See Vladeck, *supra* note 15, at 1466–68.

19. See *Al Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010).

20. See Vladeck, *supra* note 15, at 1472 n.112.

21. See *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012). But see *id.* at 1206–27 (Tatel, J., dissenting) (heavily criticizing the majority's analysis).

opportunity may be constitutionally required.²² And even in cases in which a detainee *has* prevailed on the merits, the court has refused to order a detainee's release when the only place such release could lawfully be effectuated was within the territorial United States.²³

The net effect of these holdings is clear. As Judge Silberman rather succinctly explained in one case, "I doubt any of my colleagues will vote to grant a [habeas] petition if he or she believes that it is *somewhat likely* that the petitioner is an al Qaeda adherent or an active supporter."²⁴ And as Judge Edwards lamented just last month,

when I review a record like the one presented in this case, I am disquieted by our jurisprudence. I think we have strained to make sense of the applicable law, apply the applicable standards of review, and adhere to the commands of the Supreme Court. The time has come for the President and Congress to give serious consideration to a different approach for the handling of the Guantanamo detainee cases.²⁵

The statistics bear out both of these views. Since the D.C. Circuit's June 2010 decision in *Al-Adahi* (adopting the conditional probability approach), the district court has granted just *one* detainee habeas petition—in *Latif*, which was reversed by a divided panel on appeal.²⁶

Thus, for better or worse, it is going to be all-but impossible for a detainee to prevail on a habeas petition under the jurisprudence governing the Guantánamo litigation. Instead, the focus of that litigation has shifted to ancillary issues, including the detainees' continuing right of access to counsel; their ability to

22. *Hamdi* might be distinguished on the ground that, in that case, there was no question as to the detainee's due process rights. See, e.g., *Almerfed v. Obama*, 654 F.3d 1, 5–6 (D.C. Cir. 2011). But nothing in *Latif*—or in any of the D.C. Circuit's other "merits" decisions—has turned on the possibility that the detainees *lack* due process rights.

23. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235, *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010) (*per curiam*).

24. *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (*emphasis added*).

25. *Hussain*, No. 11-5344, 2013 WL 2990993, at *8 (Edwards, J., concurring in the judgment).

26. See *Latif*, 677 F.3d 1175.

challenge force-feeding; and so on.²⁷ Whatever else might be said about these developments, the larger point remains the more important one: it is highly unlikely that the courts are going to play a meaningful role in closing Guantánamo. Instead, as Judge Edwards suggested in *Hussain*, if any effort is going to be made to reduce the detainee population and/or close the facility outright, the onus is going to fall squarely—and virtually exclusively—on the political branches.

III. TERRORISM TRIALS IN THE ARTICLE III COURTS

Nor can there continue to be any question about the ability of our ordinary civilian courts to handle high-profile terrorism prosecutions. In a forthcoming article,²⁸ my colleague Jen Daskal and I survey some of the key developments in the law over the past decade—all of which have made it easier for the government to prosecute terrorism suspects in the civilian courts while simultaneously preserving the government's ability to gather intelligence and protect classified information.²⁹ Although not an exhaustive list, these developments (to which more complete citations are provided in our article) include:

- The so-called Foreign Intelligence Surveillance Act (FISA) wall, which was sharply criticized by the 9/11 Commission for inhibiting the sharing of intelligence and law enforcement information and thereby contributing to pre-September 11 law enforcement failures, has come down. Thanks to amendments included in the USA PATRIOT Act of 2001, FISA now explicitly permits the coordination of law enforcement and intelligence officials to protect against acts of international terrorism, and various statutory reforms over the past decade have only further facilitated such interagency cooperation.
- The FISA Amendments Act of 2008 further authorized the government, albeit not without controversy, to engage in the warrantless interception of communications that take place in the United States if the targets are

27. See, e.g., Stephen I. Vladeck, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantánamo*, 161 U. PA. L. REV. PENNUMBRA 78 (2012).

28. See Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SEC. J. (forthcoming 2013), available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/After-the-AUMF-Final.pdf>.

29. I also explored these issues in the more specific context of one of the higher-profile post-9/11 terrorism prosecutions. See Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501 (2010).

foreigners overseas. In a recent debate, Sen. Dianne Feinstein, Chairwoman of the Senate Intelligence Committee, described these authorities as having “produced and continu[ing] to produce significant information that is vital to defend the nation against international terrorism and other threats”—including information relied upon in making recent terrorism-related arrests.

- Substantive criminal laws have evolved to respond to the changing nature of the threat. Material support statutes, for example, which have been interpreted broadly, were expanded to cover overseas conduct in October 2001, with further expansions in 2004. Additional substantive expansions to these laws were also added in 2004, including the addition of a new crime of “receiving military-type training from a foreign terrorist organization.”
- In 2009, the High-Value Intelligence Group was put into effect—pulling together the expertise of top intelligence professionals across the government, including from the FBI, CIA, and DOD—to design and conduct intelligence interviews of high-value terrorism detainees.
- Federal courts have recognized an expanded “public safety” exception to *Miranda* to allow for the limited introduction into evidence of unwarned statements.
- An increasing cohort of judges and civilian prosecutors has successfully navigated the handling of classified information. Obvious examples include the recent closed-door arraignment of three European men apprehended on their way to Yemen and accused of supporting al Shabaab, and the extensive handling of classified information in the prosecution of Ahmed Ghailani, now serving a life sentence for his role in the 1998 embassy bombings. But other examples abound.
- Meanwhile, widely cited fears about the potential harm of bringing high-profile terrorism suspects into federal court have proven baseless. Not a single terrorist trial has been attacked, and not a single terrorism suspect or convict has escaped.

Of course, reasonable minds may disagree about the merits of any or all of these developments. But what cannot be gainsaid is that they have made it far

easier for the government to prosecute terrorism suspects in our ordinary civilian courts—and to do so without sacrificing intelligence-gathering capabilities or the need to keep properly classified information from public scrutiny.

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In the final analysis, closing Guantánamo raises a host of complex legal, logistical, and political questions. But whether the detainees can be tried in military commissions or Article III courts is not one of them.

Thank you again for the opportunity to submit this statement for the record.

WITNESS AGAINST TORTURE
a campaign to shut down Guantánamo

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Closing Guantánamo : The National Security, Fiscal, and Human Rights Implications

Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

July 22, 2013

Witness Against Torture —Statement for the Record

To the Senate Judiciary Subcommittee on the Constitution, Human Rights, and Civil Rights:

We are Witness Against Torture, a grassroots organization that has worked since 2005 to close the prison at Guantánamo, end US torture, advocate accountability for the torturers, and justice for the victims. We are not lawyers, or political figures, or professional advocates. Rather, we are women and men, of diverse backgrounds, ages, occupations and faiths, devastated by the US's embrace of torture and indefinite detention and determined to have our government abide by the Constitution, its founding ideals, and the principles of human rights and justice it professes. For many of us, this work has been, along with our dedication to our families and communities, the most important commitment in our lives.

We represent, in short, an important part of the citizen voice, so often left out of media coverage of Guantánamo and government deliberations over detention policy. For years now, the myth of public indifference toward Guantánamo has functioned as an excuse — by the White House especially, but by Congress also — for official inaction. That myth, and that inaction, must end.

Indeed, the ongoing hunger strike at Guantánamo has galvanized anew public concern over the prison. Since the strike began in February, there have been hundreds of rallies and vigils in American cities and towns; the collection of more than 300,000 petition signatures calling for the closure of Guantánamo (one petition, issued by the Former Guantánamo Chief Prosecutor Colonel Morris Davis, garnered more than 200,000 signatures in two weeks); countless calls of protest to the White House and the US Southern Command; thousands of letters of sympathy to the Guantánamo detainees; the participation of hundreds of people in solidarity fasts with the hunger strikers; a delegation of US activists to Yemen to meet with the family members of detained men; and non-violent arrest actions at the White House, at Federal Court in New York City, and in other cities around the country. Two US military veterans are currently on perilous hunger strikes of their own (66 and 44 days, respectively) in protest of Guantánamo.

Young people especially are now flocking to the movement to close the prison. Just children when the 9-11 attacks happened — and thus too young to have internalized the politics of fear defining the early “war on terror” — they can scarcely comprehend that such a place as Guantánamo exists, which so grossly violates American notions of due process and basic, human decency. Not since the

worst days of the Bush administration has Witness Against Torture seen such an outpouring of solidarity with the detained men, anger at US policy, and public action to close Guantánamo.

Most importantly, the hunger strike at Guantánamo, the sickening practice of force-feeding, and other, petty cruelties have again shattered the fiction that Guantánamo is a “humane” prison. Rather, it is a place of persisting torture, whether through physical abuse or the torment of indefinite detention. It is as wrong today as it was when it first opened, and it must close immediately, in a just and responsible way.

We appreciate this opportunity to address Congress as it reconsiders the very existence of the prison. We first narrate the history of our group, highlighting the range of our activities and the many dimensions of the Guantánamo saga they touch upon. Next, we outline our core perspective on Guantánamo and our sense of what closing the prison ultimately requires. We conclude by sharing a poem that captures with special force our position, our passion, and our view of what justice with respect to Guantánamo means.

Witnessing Against Torture

Witness Against Torture got its start when, in December 2005, twenty five US citizens traveled to Cuba at great legal risk to protest the prison at the gates of the US Naval base itself. Moved in part by their Christian faith to oppose torture, many also prayed in compassion for the men held there. Word of the protest made it to the detained men, who in turn conveyed through attorneys their appreciation for the concern of Americans with their plight.

After returning to the United States, the group worked to mobilize opposition to Guantánamo and confront those responsible for detention policy. Witness Against Torture’s activism has entailed annual demonstrations in Washington, D.C. on January 11 (the date of the prison’s opening in 2002); group fasts of ten days or more to accompany the January protests; countless educational events at universities, churches and community centers; lobbying and other outreach efforts to lawmakers; numerous media interviews, letters-to-the-editor, and other published writings; and work in coalition with groups like the Center for Constitutional Rights and Amnesty International to organize rallies, press briefings, and symposia. We are perhaps best known for our for silent processions of people in orange jumpsuits and black hoods — the iconic, globally recognized image of the Guantánamo prisoner — in Washington, D.C. and other cities. Images of our protests have accompanied hundreds of news stories worldwide.

Throughout, Witness Against Torture has been motivated by desire to see the detained men in human terms, and not as they are cynically (and inaccurately) depicted in the media and the rhetoric of government. Hence, we have carried their pictures and recited their names in public, shared their stories and their poetry, and reached out to their families.

We have also educated ourselves in the circumstances of their capture and the overwhelmingly flimsy “evidence” — often obtained under torture — used to “justify” their detention. Such information goes to the heart of our protest, as it exposes the “great lie” with respect to Guantánamo: that the prison houses only “the worst of the worst,” who mean America grave harm. This fiction, first promulgated by Dick Cheney and other architects of Guantánamo but repeated to this day by lawmakers and pundits, has poisoned public understandings of Guantánamo and inhibited responsible changes in detention policy.

To be sure, Guantánamo now houses a handful of so-called “high value detainees,” likely guilty of serious crimes (though these were largely transferred to Guantánamo from black sites, one may recall, only in the fall of 2006 so as to bolster support for the Military Commissions Act). But the vast majority of the population, as credible research has shown, were captured neither “on the battlefield” nor by US forces. In fact, many were sold for bounty to US forces and are guilty of nothing more than being in the wrong place at the wrong time. Others were foot soldiers with the Taliban and various militias, hardly worthy of extended interrogation and confinement. Moreover, no less a figure than Secretary Colin Powell’s Chief of Staff, Lt. Col. Lawrence Wilkerson, signed an affidavit reporting that leading figures in the Bush administration knew that the great majority of prisoners at Guantánamo were far from committed terrorists. Much of our work, therefore, has been devoted to piercing the smog of propaganda and ignorance by revealing the reality of Guantánamo and just who is held there. In this work, we have been stunned to see how tenaciously Guantánamo’s apologists shield themselves from the truth of America’s disgraceful conduct, as if perpetuating falsehoods exonerates that shame.

In addition, Witness Against Torture has for years participated in non-violent civil disobedience, in the great tradition of Martin Luther King, Jr., Dorothy Day, and Gandhi. Notably, in January 2006 we engaged in a mass arrest at the District Court in Washington, D.C., where the cases of the detainees would be heard if they had proper access to federal courts. A year later, as the Supreme Court considered whether the detainees had *habeas* rights, over 100 of us were arrested at the courthouse. When arrested, many of us did not produce our own identification but instead took the names of detainees, so as to give them symbolically the day in court their captors had to that point denied. At the trial stemming from our arrest we spoke on behalf of the detained men and worked to put Guantánamo itself on trial. In 2009, a dozen members of Witnessed Against Torture were arrested in the rotunda of the Capitol, where they lay death shrouds and flowers in honor of three prisoners who died in Guantánamo in 2006, possibly by having been tortured to death.

We believe, with great champions of justice through the ages, that the law may be broken — compassionately, non-violently — when law itself becomes the enemy of justice. Such acts of civil disobedience themselves expose fractures in the law and the need for law to heal itself. We have further embraced non-violent civil disobedience as a means to communicate to the US government, the men on whose behalf we struggle, and the eyes of the world the commitment of US citizens to oppose

torture and indefinite detention. Last, we see the US legal system, responsible in part for the detainees' abuse, as a vital arena for our protest and our witness.

The activities of Witness Against Torture have evolved as the politics of Guantánamo have changed. Our hopes soared when President Obama signed on day one of his administration an Executive Order mandating that Guantánamo close within a year. To support the President in this policy, we launched a "100 Days to Close Guantánamo" campaign, keeping daily vigil at the White House.

We then saw defeat snatched from jaws of victory. The President, fearful of potential political costs and clearly weak in his commitment to his own policy, stepwise abandoned his plan for closing the prison. Members of Congress, exploiting fear and seeking cheap political points, imposed onerous restrictions on the transfer of detainees, further hobbling the administration's faint efforts. Grossly inflated Department of Defense statistics on former detainees "returning to the battlefield," invoked as reason to maintain Guantánamo, lay unchallenged by the Obama administration and much of the press. President Obama, moreover, embraced the letter or the spirit of policies of the Bush administration he had once opposed, from the Military Commissions, to the granting of functional immunity for all those implicated in the US torture program, to efforts to gut the *habeas* rights granted detainees by the Supreme Court. Over time, the media largely lost interest in Guantánamo, while Americans appeared to learn to live with the permanence of the prison and America's identity as a torture nation.

Much of our work in the last four years has been to call out the hypocrisy of President Obama, to keep Guantánamo on the political radar and in the conscience of the nation, and to give, by our continued protest, some small measure of hope to detained men facing the dismal prospect of lifetimes of detention, without the chance of proper due process.

In the face of their brutal condition, the detained men themselves acted to seize their own destiny by starting a new hunger strike in February of this year. Repeatedly described by them as a desperate act to secure dignity and justice, the hunger strike represents the best and perhaps last occasion for the United States to reckon with Guantánamo and begin to set right a terrible wrong. President Obama himself acknowledged the urgency of the situation and the need to restart efforts to close the prison. But his speech was already nearly two months ago, during which time not a single detained man — even among the 86 cleared for transfer by the US government itself — has been released from the prison. As yet there is only a renewed promise, which must now become a concrete plan, followed by decisive action. Our work, therefore, continues.

Opposing Guantánamo , Closing the Prison

The consistent position of Witness Against Torture, underscored by the current hunger strike, is that Guantánamo is a moral and legal abomination. It violates the Constitution, makes a mockery of the rule of law, and savages American ideals. It grossly diminishes America's standing in the world. It

weakens our safety. It holds us captive to fear and implicates all of us in a terrible evil, recognized as such by most of the world, and for which history will judge the United States harshly.

President Obama's failure to close Guantánamo and embrace of Bush-era policies vindicate neither the prison nor those policies. Rather, they show how broadly the American political system is complicit in grave ills. Guantánamo and torture have never been matters of left and right. We see them, rather, as matters of right and wrong, which must be rejected, regardless of partisan affiliation and political calculation.

We are well versed in policy detail, legal particulars, partisan maneuvering, and all the barriers, real and perceived, to now closing Guantánamo. Great political skill will doubtless be required to finally shutter the prison. But above all, what is required is moral courage and the political will to do so, in the face of persisting fear-mongering and the anxiety of numerous institutions and agents of government that closing Guantánamo may expose them to further embarrassment and political risk.

President Obama must honor his intentions. The integrity of the nation, his legacy, and most importantly, the lives of the detained men are at stake. We ask Congressional critics of Guantánamo both to hold the President to his word and to remove legislative barriers to Guantánamo's swift closure. To those lawmakers uncertain about the prison, we plead that they educate themselves in facts and listen to voices in the US military who maintain that Guantánamo makes the United States neither stronger nor more secure. To those defenders of Guantánamo — whether acting in ignorance, with malice, or out of misguided conviction — we insist that they now step to the sidelines of politics and history, before they do more damage to the United States and the principles of fairness and justice it claims. Saving the remnants of America's tattered honor must take precedence over saving face. With faith in our own ideals and power and possibility of redemption, justice can prevail.

The Greatest Threat to Ourselves

At our rallies and vigils, we often hold moments of silence, sing songs, and recite poems. One such poem, written by a young, gifted member of our group, speaks in a special way to our values, our actions, and the stakes of resisting Guantánamo and torture. Above all, it asks who we are, as a people and a nation, and what our own ideals oblige us to do. We share this poem so that you may consider these questions yourselves:

There is a Man Under That Hood • By Luke Nephew

We are not here to make angels out of prisoners.
We don't know them,
but we know they still are men.
And so we defend
those that disappear
under hoods into jumpsuits, bringing back

into the light every CIA black site
 because right now
 there is a man under that hood.

A brother breathing prayers of desperation,
 striking hunger so hard that his ribs
 are about to crack
 in Afghanistan, in Guantánamo , in Iraq.

There is a man under that hood
 who is being treated as less than human.
 His rights have been dismissed
 with the label terrorist
 and just for saying this
 you probably put my name on a list,
 but it is too serious to us to not resist.

Mr. President, I need you to know,
 if it were you hooded and chained,
 we would be here demanding the same
 human rights for you.

Mr. Senator, we would walk through these streets
 with your name on our back.
 We would fast in solidarity with your hunger strike.

Mrs. Congresswoman, even after months
 under black cloth
 making you cough,
 we would speak for you.

Mr. Newsman, Mrs. Citizen,
 we would be right here for you,
 because human rights are universal.

This is life, not a rehearsal.
 We, we are here because we cannot decide
 who is human and who is not.
 We cannot steal years of men's lives
 based on lies

extracted from torture and bribes
without becoming the greatest threat to ourselves.

We have sat inside a cell
and it has taught us how wrong it is to cage men
because they fell like corpses
into the category of enemy combatants.

I will not act like nothing happened
when it's happening now.

I will not bow
to injustice. I will speak
for the change that was promised.

I'm not ashamed to be honest, Mr. President.
We have cried, Mr. President.
Clouds of consciousness overflowing out these eyes,
Mr. President, for the moments when we
have the courage to realize
that there is a man under that hood.

No matter how beaten and bruised,
there is a man under that hood
that is exactly as human as you.

There is a man under that hood
regardless of his religion. There is a man
who doesn't understand
why it's so hard for us to see him,
why it's so hard for us to imagine
what it would be like to be him
there, where they sit in our prisons
hidden from our justice system,
locked away.

Are we going to pretend
they're less than men and just walk away?

Or will we raise our eyes above the walls?
Will we raise our voices to call out our government
and say we see you;
we are watching what you're doing?

And no matter how many times
they call you terrorist,
we will recognize that you are human.

And to the detainees,
no matter how broken and shattered
and tortured you feel, there are people
in these United States who hear you
and see you, who know that you are real.

And to the people in my country, please,
do not pretend to be seeking freedom
or justice, or any common good
until we are ready to recognize the human rights
of every single man under that hood.

Coalition for Security, Liberty and the Law

20 December, 2012

President Barack Obama
The White House
1600 Pennsylvania Ave, NW
Washington, D.C. 20500

Dear Mr. President:

As you are aware, the National Defense Authorization Act of Fiscal Year 2013 – the final text of which was agreed upon recently by House of Representatives and Senate Conferees, and will soon come to a vote before both bodies – contains a provision prohibiting the use of federal funds to transfer terrorist detainees from Guantanamo Bay to facilities inside the United States.

Our past experience as military, intelligence, and security policy professionals leads us to believe that the transfer of Guantanamo detainees into the United States would threaten national security and public safety. **We therefore urge you not to veto the NDAA over this provision and instead allow it to stand.**

Detainees transferred to U.S. prison facilities would turn those prisons – and nearby civilian populations – into terrorist targets. Based on past experience in Guantanamo, they would expose prison staff to unique threats, physical risks and legal liabilities. It is also likely that detainees, with help from counsel, would pressure prison officials to remove special security restrictions. If successful in such efforts, the detainees could have opportunities to radicalize the prison population – a risk previously noted by FBI Director Robert Mueller.

To the extent that detainees would receive criminal trials if transferred to the United States, such trials would entail granting due process and other rights that may force the government to choose between revealing classified evidence to secure a conviction in a U.S. court or dropping charges against dangerous terrorists.

Some have argued that Guantanamo remains a symbol of “torture”, and therefore a recruitment tool for terrorists that must be shut down. However, Guantanamo is not only a highly humane and – according to Attorney General Eric Holder – a “well-run, professional facility”, it is also uniquely secure in ways that cannot be replicated at detention facilities within the United States. Additionally, there is little evidence that Guantanamo has played a significant role in the recruitment of terrorists to al Qaeda or its affiliates.

For these reasons, we believe strongly that the detainees should not be transferred to any locale in the United States or its territories, and should instead be kept at

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Guantanamo Bay. The potential national and local security risks associated with transferring detainees to the United States greatly outweigh any perceived benefits for American foreign policy or national security if such closure were to take place.

Sincerely,

Hon. Michael B. Mukasey, former Attorney General of the United States

R. James Woolsey, former Director of Central Intelligence

Adm. Jerome L. Johnson, USN (Ret.)

Adm. James "Ace" Lyons, USN (Ret.)

Lt. Gen. E.G. "Buck" Shuler, Jr., USAF (Ret.)

Brig. Gen. William A. Bloomer, USMC (Ret.)

Brig. Gen. William Weise, USMC (Ret.)

Tidal McCoy, former Acting Secretary of the Air Force

Andrew C. McCarthy, former Chief Assistant United States Attorney

Frank J. Gaffney, Jr., former Acting Assistant Secretary of Defense for International Security Policy

Debra Burlingame, 9/11 Families for a Safe and Strong America

Elaine Donnelly, 1992 Presidential Commission on the Assignment of Women in the Armed Services

cc: Members of the Senate Armed Services Committee
Members of the House Armed Services Committee

Coalition for Security, Liberty and the Law

7 October, 2009

President Barack Obama
The White House
1600 Pennsylvania Ave, NW
Washington, D.C. 20500

Dear Mr. President:

As you know, the Department of Defense has since September 11, 2001 detained at Guantanamo individuals identified or treated as enemy combatants. Yet, shortly after you took office in January of 2009, you issued an Executive Order mandating the closure by January 22, 2010 of the detention/interrogation facilities at the Guantanamo Bay Detention Facility, U.S. Naval Base, Cuba (popularly known as Gitmo.)

Our past experience as military, intelligence, law enforcement and security policy professionals leads us to believe that the transfer of Guantanamo detainees into the United States would threaten national security and public safety.

For example, prisoners transferred to U.S. prisons would turn those prisons – and the nearby civilian populations – into high-probability terrorist targets. Based on past experience in Guantanamo, they would also expose prison staff to unique threats, physical risks and legal liabilities. FBI Director Robert Mueller has warned that the high-value prisoners will also contribute to the radicalization of prison populations. Detainees will pressure prison officials to remove special security restrictions and will receive due process and other rights that may force the government to choose between revealing classified evidence to secure a conviction in a U.S. court or dropping charges against dangerous terrorists and releasing them from prison. Over 500 lawyers describing themselves as the “Gitmo Bar” stand ready to file the paperwork to free any detainees transferred to U.S. prisons.

If detainees are released and cannot be resettled abroad securely, they may be resettled inside the United States. Worse yet, according to Director of National Intelligence Dennis Blair, U.S. taxpayers may be required to provide financial support for such detainees to “start a new life” here.

Moreover, the Department of Defense asserts that at least 61 of the 520 detainees released from Gitmo so far are confirmed or suspected of having returned to terrorism – other Department sources put the number at 102 of 520 detainees.

For these reasons, we believe strongly that the detainees should not be transferred to any locale in the United States or its territories, and should be kept at Guantanamo Bay until a more permanent and secure alternative is found. Today, potential national and

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local security risks greatly outweigh any prospective economic benefits for states under consideration for such transfers.

In conclusion, as a matter of national security, we strongly advise that the Department of Defense and other federal or state agencies spend no funds to accomplish the closure of Guantanamo detention facilities or the transfer of Guantanamo detainees into the United States. All efforts should be made to enable state representatives to have opportunities to visit Gitmo and to be briefed on the risks associated with the management of Gitmo detainees.

Sincerely,

Army

Gen. Frederick J. Kroesen, USA (Ret.)

Maj. Gen. Thomas F. Cole, USA (Ret.)

Maj. Gen. Vincent E. Falter, USA (Ret.)

Maj. Gen. Alvin W. Jones, USA (Ret.)

Maj. Gen. Henry D. Robertson, USA (Ret.)

Maj. Gen. Mel Thrash, USA (Ret.)

Brig. Gen. Francis A. Hughes, USA (Ret.)

Brig. Gen. Ronald K. Kerwood, USA (Ret.)

Brig. Gen. Gary J. Tellier, USA (Ret.)

Lt. Col. Gordon Cucullu, USA (Ret.);

Author of *Inside Gitmo: The True Story Behind the Myths of Guantanamo Bay*

Navy

Adm. Jerry Johnson, USN (Ret.)

Adm. James "Ace" Lyons, USN (Ret.)

Vice Adm. Robert Monroe, USN (Ret.)

Vice Adm. David C. Richardson, USN (Ret.)

Rear Adm. Lawrence Burkhardt III, USN (Ret.)

Rear Adm. H.E. Gerhard, USN (Ret.)

Rear Adm. James M. Gleim, USN (Ret.)

Rear Adm. Robert H. Gormley, USN (Ret.)

Rear Adm. James B. Morin, USN (Ret.)

Rear Adm. Robert S. Owens, USN (Ret.)

Rear Adm. Don G. Primeau, USN (Ret.)

Rear Adm. Rollo Rieve, USN (Ret.)

Rear Adm. Hugh Scott, USN (Ret.)

Air Force

Gen. Charles A. Horner, USAF (Ret.)

Lt. Gen. E.G. "Buck" Shuler, Jr., USAF (Ret.)

Lt. Gen. William H. Ginn, Jr., USAF (Ret.)

Maj. Gen. Charles L. Wilson, USAF (Ret.)

Brig. Gen. Bernard W. Gann, USAF (Ret.)

Marine Corps

Gen. P.X. Kelley, USMC (Ret.)

Maj. Gen. Geoffrey Higginbotham, USMC (Ret.)

Maj. Gen. Joseph D. Stewart, USMC (Ret.)

Brig. Gen. William A. Bloomer, USMC (Ret.)

Brig. Gen. Gary E. Brown, USMC (Ret.)

Brig. Gen. M.A. Johnson, Jr., USMC (Ret.)

Brig. Gen. William L. McCulloch, USMC (Ret.)

Brig. Gen. William Weise, USMC (Ret.)

National Security

R. James Woolsey, former Director of Central Intelligence

Tidal McCoy, former Acting Secretary of the Air Force

Andrew C. McCarthy, former Chief Assistant United States Attorney

Bradford A. Berenson, Associate Counsel to the President, 2001-2003

Frank J. Gaffney, Jr., former Assistant Secretary of Defense for International Security Policy

Dr. Peter Leitner, President, Higgins Counter-Terrorism Research Center

Elaine Donnelly, 1992 Presidential Commission on the Assignment of Women in the Armed Services

cc: Members of the 111th Congress

The Honorable Robert M. Gates, Secretary, U.S. Department of Defense

The Honorable Eric H. Holder, Jr. Attorney General of the United States

The Honorable Dennis Blair, Director of National Intelligence

The Honorable Robert Mueller, Director, Federal Bureau of Investigation

